Office-Supreme Court, U.S.
FILED
OCT 9 1984
ALEXANDER L. STEVAS,
CLERK

84-590

NO.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

RED STAR MARINE SERVICES, INC.,

*Petitioner,*

*vs.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

JAMES M. KENNY
*Attorney for Petitioner*
80 Pine Street
New York, New York 10005
(212) 422-0222

1395

## Questions Presented

1. Whether OSHA has jurisdiction to regulate the working conditions of seamen on vessels employed on navigable waters.

2. Whether regulation and supervision of working conditions on uninspected vessels by another Federal agency, the United States Coast Guard, preempts OSHA pursuant to 29 U.S.C. §653(b)(1) from regulating in this area.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| STATUTORY PROVISION INVOLVED | 3 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT: | |
| 1. The decision below conflicts with the decisions of other courts of appeals as to OSHA's jurisdiction to regulate the workplaces of seamen | 8 |
| 2. The decision below raises significant problems for the marine towing industry and other industries | 10 |
| CONCLUSION | 13 |
| APPENDIX: | |
| A—Opinion of the United States Court of Appeals | 1a |
| B—Judgment of the United States Court of Appeals | 24a |
| C—Decision and Order of the Occupational Safety and Health Review Commission | 26a |
| D—Direction for Review and Remand Order of the Occupational Safety and Health Review Commission (August 31, 1982) | 32a |

PAGE

E—Decision and Order of the Occupational Safety and Health Review Commission (August 2, 1982) ..... 36a

F—Summary and Order of the Occupational Safety and Health Review Commission (January 27, 1981) ..... 48a

PAGE

## *Table of Authorities*

### Cases Cited

Barger v. Mayor & City Council of Baltimore, 616 F.2d 730 (4th Cir. 1980) ..... 9

Clary v. Ocean Drilling and Exporation Co., 609 F.2d 1120 (5th Cir. 1980) ..... 8

Dillingham Tug & Barge Corp., 1982 CCH OSHD ¶26,166 ..... 7, 12

Donovan v. Texaco, Inc., 720 F.2d 825 ..... 8, 9, 12

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982), 73 L.ed. 2d 300, 102 S.Ct. 2654 ..... 10

Marshall v. Northwest Orient Airlines, 574 F.2d 119 (2d Cir. 1978) ..... 12

Organized Migrants In Community Action Inc. v. Brennan, 520 F.2d 1161 (D.C. Cir. 1975) ..... 12

Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976) ..... 12

Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942), 86 L.ed. 1246, 62 S.Ct. 886 ..... 4

Taylor v. Moore-McCormack Lines Inc., 421 F.2d 88 (4th Cir. 1980) ..... 9

Udall v. Tallman, 380 U.S. 1 (1965), 13 L.ed. 2d 616, 85 S.Ct. 792 ..... 13

### Statutes Cited

Occupational Safety and Health Act of 1970:

Sec. 4(b)(1) ..... 3, 4, 7, 8, 13

PAGE

38 Stat. 1164 (1915) ..... 4

Title 46, United States Code, "Shipping" ..... 4

28 U.S.C.:

Sec. 1254(1) ..... 2

29 U.S.C.:

Sec. 653(a) ..... 11

Sec. 653(b)(1) ..... i, 3

33 U.S.C.:

Sec. 151 ..... 5, 11

46 U.S.C.:

Chapter 1 ..... 5

Chapter 41 ..... 5

Sec. 88 ..... 6, 11

Sec. 2101(33) ..... 5

Sec. 2101(43) ..... 5

Sec. 3301 ..... 5

Sec. 3301(7) ..... 5

Sec. 3309 ..... 5

Sec. 8904 ..... 5

**Regulations Cited**

29 C.F.R.:

Sec. 1910.95 ..... 3, 9

PAGE

46 C.F.R.:

Sec. 405-1 ..... 6

Sec. 4.07-1(b) ..... 6

Sec. 4.07-10 ..... 6

Sec. 4.07-15 ..... 6

Sec. 5.01-1 ..... 6

Subchapter C ..... 5, 6

**Other Authority Cited**

H.R. Rep. No. 338, 98th Cong. 1st Sess., 123 ..... 4

NO.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

RED STAR MARINE SERVICES, INC.,

*Petitioner,*

*vs.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner Red Star Marine Service, Inc. prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this cause.

## Opinions Below

The opinion of the Court of Appeals, reported at 739 F.2d 774, appears as Appendix A hereto.

Four Administrative Agency opinions in this case are necessary to ascertain the grounds for the Court of Appeals judgment. These are: 1) The decision and order of the Administrative Law Judge (ALJ) regarding the jurisdiction of the Occupational Health and Safety Administration (OSHA), reversed by the Court of Appeals, unofficially reported at 1983 CCH OSHD ¶26,618, appears as Appendix C hereto; 2) The Direction for Review and Remand Order of the Occupational Safety and Health Review Commission (Commission) pursuant to which the now reversed decision of the ALJ was rendered, unofficially reported at 1982 CCH OSHD ¶26,203, appears as Appendix D hereto; 3) The Decision and Order of the ALJ, after initial hearing, unofficially reported at 1982 CCH OSHD ¶26,202. 4) The Decision and Order of the ALJ regarding the pre-hearing motion to dismiss appears as Appendix F hereto and is unreported.

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 10, 1984 (Appendix B hereto). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## Statutory Provision Involved

The questions presented require the interpretation of section 4(b)(1) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §653(b)(1). This section provides that:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

## Statement of the Case

Petitioner, Red Star Marine Services, Inc. (Red Star), operates tugs and towboats on the eastern seabord of the United States. The employees on the vessels are seamen. A seaman complained to OSHA about noise levels on the tugboat "STAMFORD". An OSHA Compliance Officer monitored the engine room and crew living quarters of the Red Star tugboat STAMFORD for sound through the use of a noise dosimeter while operating afloat on Long Island Sound on May 27 and May 29, 1980. The Compliance Officer was aboard pursuant to an *ex parte* warrant issued by a United States Magistrate. OSHA asserted jurisdiction over the workplace on a tugboat because the United States Coast Guard, the dominant Federal agency in maritime matters, did not have noise regulations with regard to uninspected vessels. As a result of the sound tests, OSHA charged Red Star with violations of the noise level regulations of the OSH Act, 29 C.F.R. 1910.95. This regulation sets out noise levels which are dangerous, requires that employers take steps to reduce the noise or provide employees with per-

sonal protective devices and mandates the establishment of hearing conservation programs. The sound levels in the tug's engine room exceeded OSHA limits.

Red Star from the outset contested OSHA's jurisdiction over the workplaces of seamen employed on board the tug STAMFORD, an uninspected vessel. Red Star contended that the Coast Guard was charged by Congress and did regulate the working conditions on board all vessels, inspected and uninspected, and Congress, therefore, precluded OSHA pursuant to section 4(b)(1) of the OSH Act from exercising authority in this area.

The STAMFORD is a vessel which in 1980 was employed in towboat operations in the waters of Long Island Sound with trips on the high seas as far north as Boston, Massachusetts. The members of the crew of the STAMFORD are seamen who live on board the vessel for two weeks, working two six-hour shifts per day. As seamen, the crew members enjoy extraordinary Congressional protection to promote their "safety at sea." 38 Stat. 1164 (1915). Elaborate rules concerning the working conditions of seamen on shipboard have been legislated. These include "such matters as their medicines, clothing, heat, hours, watches, wages . . .", *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 39 (1942), 86 L.ed. 1246, 62 S.Ct. 886. These protections are included in Title 46 United States Code, "Shipping". Historically, the "Commandant of the Coast Guard through the Secretary of Transportation has broad authority to carry out the provisions of this Act ["Shipping"] in the interests of *all* aspects of maritime safety and seamen's welfare." (emphasis added.) H.R. Rep. No. 338, 98th Cong. 1st Sess., 123.

The vessel is licensed and documented by the Coast Guard to perform towboat services on navigable waters of the United States. The STAMFORD is an uninspected

vessel within the meaning of that term as determined in the Chapter I of 46 Code of the Federal Regulations and Title 46 U.S.C. The Coast Guard categorizes uninspected vessels, generally, as vessels under 300 gross tons. Section 2101(43) of Title 46, United States Code, defines an uninspected vessel as "a vessel not subject to inspection under section 3301 of this Title that is not a recreational vessel." Section 3301 lists ten categories of vessels which are subject to Coast Guard inspection, while 46 U.S.C. 3309 provides for a certificate of inspection to be issued to a vessel found to be in compliance with law and regulation. The category which includes towing vessels (tugboats) is 46 U.S.C. 3301(7), "seagoing motor vessels," defined in 46 U.S.C. 2101 (33) as "motor vessel(s) of at least 300 gross tons making voyages beyond the Boundary Line."* A seagoing towing vessel of less than 300 gross tons is then, by definition, an uninspected vessel, not included within the provisions of section 3301 and not subject to Coast Guard inspection. The gross tonnage of the STAMFORD is 256 gross tons.

The fact that the STAMFORD was an uninspected vessel does not mean that the Coast Guard never would have boarded and inspected the vessel. Uninspected vessels, *ipso facto,* are not removed from Coast Guard jurisdiction. The Coast Guard's primary authority to regulate uninspected tow vessels (tugboats) is contained in 46 U.S.C. Chapter 41 and 46 U.S.C. §8904. Regulations applicable to those vessels, contained in 46 C.F.R. Subchapter C, include requirements for lifesaving and firefighting equipment, backfire flame control, ventilation, casualty reporting, and licensed operators. Additional regulatory schemes which embody the nautical rules of the road, aids to navigation and pollution compliance requirements also apply to uninspected vessels.

---

* See 33 U.S.C. 151, demarcation lines dividing the high seas from harbors, rivers and other inland waters of the United States.

The Coast Guard in October 1977, asserted jurisdiction over this vessel and performed a stability test with regard to the STAMFORD. The Coast Guard performed studies relating to the stability of the tug and ordered physical modifications to the vessel that had to be accomplished prior to the issuance of a load line pursuant to the load line statute, 46 U.S.C. 88. Red Star complied with the Coast Guard directive and the tug was issued a load line. A load line is defined as a level that a vessel can be submerged to when traversing the high seas. Of course, the stability of the vessel related to the safety of the seamen.

All operators of vessels, inspected or uninspected, are required to notify the Coast Guard "as soon as possible" of any "marine casualty," 46 C.F.R. §405-1. Upon receipt of the notice, the Coast Guard is required to immediately begin an investigation for the purpose of taking appropriate measures for promoting safety of life and property at sea, 46 C.F.R. §4.07-1(b). If, as a result of the investigation, it is determined that measures must be taken to eliminate certain workplace hazards, the Coast Guard can recommend and, ultimately, require that measures be implemented. See 46 C.F.R. §§4.07-10 and 4.07-15. If, on the other hand, it is determined that existing regulations have been violated, the Coast Guard can take appropriate remedial action. See 46 C.F.R. §5.01-1 et seq.

Although the Coast Guard does not regulate noise levels on uninspected vessels, it obviously does exercize authority to prescribe and enforce standards and regulations which affect occupational safety and health thereon.

Before the first hearing, on Red Star's motion to dismiss for lack of jurisdiction, an OSHA ALJ, ruled that OSHA had jurisdiction to regulate the working conditions of seamen (Appendix F). After an administrative hearing, an OSHA ALJ held that Red Star failed, as

charged, to provide protection against excessive noise levels on the STAMFORD and had failed to administer a hearing conservation program for its seamen-employees (Appendix E). Red Star petitioned the Commission for review of the pre-hearing and after hearing decisions and order. The Commission remanded the case for reconsideration in light of its intervening holding in *Dillingham Tug & Barge Corp.*, 1982 CCH OSHD ¶26,166 that the Coast Guard had, and enforces, regulations that govern the working conditions of seamen on inspected and uninspected vessels on navigable waters and, therefore, section 4(b)(1) precluded the Secretary of Labor from enforcing the OSH Act with regard to the working conditions of seamen aboard vessels operating on navigable waters (Appendix D).

After an administrative hearing on remand, the ALJ reversed the prior holding concerning jurisdiction, ruling that since the Coast Guard, clearly, exercised statutory authority to regulate the health and safety of seamen employed on uninspected vessels, OSHA was prohibited from enforcing its regulations in respect thereto (Appendix C).

The Court of Appeals reversed the holding that OSHA does not have jurisdiction over the workplaces of seamen aboard uninspected vessels on navigable waters. The Court below rejected the Commissions ruling in *Dillingham* reasoning that the Coast Guard only "incidentally" regulated the conditions of seamen on uninspected vessels and is, therefore, not exercising statutory authority within the meaning of section 4(b)(1) of the OSH Act. Hence, OSHA may regulate.

## REASONS FOR GRANTING THE WRIT

### 1. The decision below conflicts with the decisions of other courts of appeals as to OSHA's jurisdiction to regulate the workplaces of seamen.

Section 4(b)(1) of the OSH Act provides that OSHA cannot exercise jurisdiction in workplaces over which a sister Federal agency has statutory authority to enforce or prescribe regulations affecting employee safety and health. The Coast Guard regulates the safety and health of seamen aboard vessels in navigable waters. Congress designated one of the Coast Guard's "primary duties" as follows:

> The Coast Guard . . . shall administer laws *and promulgate and enforce regulations for the promotion of safety of life* and property on and under the high seas and waters subject to the jurisdiction of the United States . . . 14 U.S.C. §2. (emphasis added.)

The Second Circuit decision has rejected this grant of statutory authority to the Coast Guard making that agency the dominant Federal agency responsible in the area of maritime health and safety. The ruling below, also, squarely conflicts with decisions of the Fourth and Fifth Circuits on the same issue.

The Fifth Circuit, in December 1983, in *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 826 restated its decision in *Clary* v. *Ocean Drilling and Exploration Co.*, 609 F.2d 1120 (1980) that it is the law of the circuit "that OSHA regulations do not apply to working conditions of seamen on vessels in navigation . . ." In *Donovan* v. *Texaco, supra*, 827 the court applied the *Clary* reasoning to section 4(b)(1) of the OSH Act and reframed the section as follows:

"Nothing in OSHA shall apply to working conditions of seamen on vessels." The decision below ignored this obvious conflict with the Fifth Circuit which stated the import of the *Donovan* v. *Texaco* decision as follows: "Our opinion clearly envisions that regulation of an industry by the dominant agency may be so general and pervasive as to displace OSHA coverage of it entirely, as we conclude the Coast Guard has here." *Donovan* v. *Texaco, supra,* 720 f.n.1.

The Fourth Circuit in *Barger* v. *Mayor & City Council of Baltimore,* 616 F.2d 730 (1980) followed the lead of the Fifth Circuit in *Clary, supra,* and specifically rejected the application of the very OSHA noise regulation involved in this case, 29 C.F.R. 1910.95, to the working conditions of seamen on vessels. The Fourth Circuit rule is: "The Coast Guard is empowered to lay down health and safety rules for Jones Act seamen and the courts have recognized that the OSHA regulations thus do not apply to this category of employees." *Barger, supra,* 732. The decision below (Appendix 13a) truncated the holding of the Fourth Circuit in *Barger* by shortening the Fourth Circuit's language to omit, "*and the courts have recognized that the OSHA regulations thus do not apply to this category of employees.*" (emphasis added.) The Second Circuit has distorted the Fouth Circuit's ruling that . . . the OSHA noise regulation did not apply to the working conditions of these firemen, who were Jones Act seamen . . ." by ignoring this holding. The Fourth Circuit in *Taylor Moore-McCormack Lines Inc.,* 421 F.2d 88 (1980) ruled that the Coast Guard has exclusive responsibility for the safety of seamen. The *Taylor* holding is squarely in conflict with the decision below.

These conflicts justify the grant of certiorari to review the judgment below. The interests of uniformity of decisions of federal courts of appeals on this important

issue is justification for the grant of certiorari. Further, the transient nature of vessels in navigation and maritime commerce requires uniform application of rules. *Foremost Insurance Co.* v. *Richardson,* 457 U.S. 668, 677 (1982), 73 L. ed 2d 300, 102 S. Ct. 2654.

**2. The decision below raises significant problems for the marine towing industry and other industries.**

The marine transportation industry has historically looked to the United States Coast Guard as the Federal agency regulating health and safety practices on vessels including tugs and towboats. Tugs and towboats fill a multiplicity of needs in supplying an auxiliary propulsion force in a variety of ways. Large vessels need a tug's assistance for docking operations and maneuvering in confined channels; non-self-propelled barges, cranes, "A" frames, derricks, lighters and other types of floating equipment need tugs for towing; ocean towing involves tugs in providing propulsion for drilling rigs and mining equipment; tugs maneuver in all ports of the United States, rivers, coastal, intracoastal, and intercoastal waterway systems. There are numerous types of tugboat designs to fulfill various needs such as: harbor and docking tugs, river towboats, canal tugs, railroad tugs, coastal tugs, ocean tugs, rescue and salvage tugs. Tugs are categorized by the Coast Guard as uninspected if the vessel is under 300 gross tons. To fill all the needs for towboats, some are over 300 gross tons and some are under, like the STAMFORD. Whatever the tug's gross tonnage, the vessel operates in the marine transportation industry. This industry is entitled to uniform regulation by one Federal agency and uniform enforcement of health and safety rules in all geographical areas of the United States. The

marine towing industry is peripatetic. A tug moving from New York (Second Circuit) to Baltimore (Fourth Circuit) should not steam from OSHA jurisdiction into Coast Guard jurisdiction of the workplace. Such a result is absurd but is a direct result of the opinion below.

The problem of "steaming in and out" of OSHA jurisdiction is further illustrated by the fact that the tug STAMFORD has satisfied the requirements of the load line statute, 46 U.S.C. §88 and, therefore can and does ply the waters of the high seas. 33 U.S.C. §151. The high seas is a "workplace" that is beyond OSHA jurisdiction. OSHA's geographic scope is confined "to employment performed in a workplace, in a State, the District of Columbia, the Commonwealth of Puerto Rico . . . Outer Continental Shelf Lands Act . . .", 29 U.S.C. §653(a). "A vessel on the high seas is not such a 'workplace'." *Donovan* v. *Texaco, supra,* 829.

Section 4(b)(1) of the OSH Act was intended to prevent overlapping regulation of the workplace by sister federal agencies. ". . . [R]edundant control programs offer little except confusion, governmental proliferation and stultification of enterprise." *Donovan* v. *Texaco, supra,* 827.

Economic injustice caused by the uneven application of this subject OSHA noise regulation to uninspected towboats is readily demonstrated by considering that certain towboat operators in the Second Circuit must set up and conduct a hearing conservation program while those in the Fourth and Fifth Circuits do not. Such an additional cost factor can make a Connecticut-based towboat company less competitive in bidding on towage jobs compared to a New Orleans-based company. Red Star operates along the Atlantic Coast and can be inhibited from free utilization and transfer of its equip-

ment in commerce from one federal Court of Appeals jurisdiction to another as a result of the decision below.

The decision below (Appendix 9a) and the *Donovan* v. *Texaco* decision, *supra,* 827, refer to a "Memorandum of Understanding" or "peace treaty" between OSHA and the Coast Guard, the import of which is that OSHA agrees that it may not enforce its regulations with respect to seamen on inspected vessels. This attempt to "carve up" the jurisdiction over the workplace of seamen should not be substituted for the will of Congress. It is not for OSHA or the Coast Guard to decide what their respective functions in this area are.

The effect of the decision below reaches beyond the marine transportation industry and into other industries in that it will allow OSHA to go into any industry in which a sister federal agency is dominant and enforce OSHA regulations if that sister agency does not exercise its regulatory authority in every area and as stringently as OSHA does. OSHA, in the past, has demonstrated an eagerness to compete with the Federal Aviation Agency, *Marshall* v. *Northwest Orient Airlines,* 574 F.2d 119 (2d Cir. 1978); the Federal Railroad Administration, *Southern Pacific Transportation Co.* v. *Usery,* 539 F.2d 386 (5th Cir. 1976); Environmental Protection Agency, *Organized Migrants In Community Action Inc.* v. *Brennan,* 520 F.2d 1161 (D.C. Cir. 1975). The decision below has implications beyond the marine transportation industry.

Finally, industry should be entitled to rely on the finality of a decision of an administrative agency that it does not have jurisdiction over its workplace. The OSHA ALJ and the Commission in *Dillingham, supra,* ruled that OSHA did not have jurisdiction over the workplace on uninspected vessels since the Coast Guard pre-

scribed and enforced health and safety regulations for seamen on uninspected vessels and this exercise of authority under Section 4(b)(1) of the OSH Act preempted OSHA jurisdiction over the same workplace. Such a statutory interpretation by the agency should not be disturbed by a reviewing court. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), 13 L.ed. 2d 616, 85 S.Ct. 792.

## CONCLUSION

**For these reasons, a writ of certiorari should issue to review the opinion of the Second Circuit.**

Respectfully submitted,

JAMES M. KENNY
*Attorney for Petitioner*
80 Pine Street
New York, New York 10005
(212) 422-0222

October 9, 1984

[APPENDICES FOLLOW]

## APPENDIX A

**Opinion of the United States Court of Appeals**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 727, 728—August Term 1983

(Argued: February 9, 1984 Decided: July 10, 1984)

Docket Nos. 83-4158, 4168

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

*Petitioner/Cross-Respondent,*

—v.—

RED STAR MARINE SERVICES, INC.,

*Respondent/Cross-Petitioner.*

Before:

VAN GRAAFEILAND and TIMBERS, *Circuit Judges*, and RE, *Chief Judge**.

Cross-petitions by the Secretary of Labor and Red Star Marine Services, Inc., from a final order of the Occupa-

* The Hon. Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

tional Safety and Health Review Commission, in an action by the Secretary against Red Star for violation of 29 C.F.R. § 1910.95. The Commission held that, although the Occupational Safety and Health Administration had obtained valid *ex parte* warrants to inspect the tugboat STAMFORD, it did not have jurisdiction over the working conditions of "seamen," aboard uninspected vessels.

Affirmed in part, Reversed in part, and Remanded.

---

JAMES E. CULP, Attorney, United States Department of Labor (Francis X. Lilly, Deputy Solicitor of Labor; Frank A. White, Associate Solicitor for Occupational Safety and Health; Dennis K. Kade, Counsel for Appellate Litigation; Shelley D. Hayes, Attorney, Washington, DC, of counsel), *for Petitioner/Cross-Respondent.*

JAMES M. KENNY, New York, New York (McHugh, Leonard & O'Conor, New York, New York, of counsel), *for Respondent/Cross-Petitioner.*

---

RE, *Chief Judge*:

By cross-petitions, both parties appeal from a final order of the Occupational Safety and Health Review Commission (Commission) which held that, although the Occupational Safety and Health Administration (OSHA)

obtained a valid *ex parte* warrant, it did not have jurisdiction over the working conditions of "seamen" aboard an "uninspected vessel." In general terms, this case presents a jurisdictional conflict between two federal agencies, OSHA and the Coast Guard.

The two questions presented are: (1) whether OSHA has jurisdiction over the "working conditions" of employees aboard uninspected vessels[1] operating on navigable waters, or whether the Coast Guard, a sister federal agency, had "actually exercised" its authority over the working conditions of employees aboard uninspected vessels operating on navigable waters; and (2) whether the *ex parte* warrants obtained by OSHA in this case were valid.

Since we hold that OSHA has jurisdiction over the working conditions of employees aboard uninspected vessels, and that the *ex parte* warrants were valid, we remand the case for further proceedings consistent with this opinion.

## *The Facts*

Red Star Marine Services, Inc. (Red Star) operates a tugboat and marine towing service along the eastern seaboard of the United States. Its fleet includes the tugboat "STAMFORD," which was inspected by an OSHA Compliance Officer on the 27th and 29th of May, 1980. The inspection, prompted by an employee complaint, was conducted pursuant to an *ex parte* warrant

---

[1] Chapter I of 46 Code of Federal Regulations and the recent amendments to Title 46, United States Code, enacted by Pub. L. 98-89, 97 Stat. 500 (1983), classify vessels according to factors such as weight, purpose, and method of propulsion. One type of vessel classified pursuant to Title 46 is an "uninspected vessel," which is a term used to denote that it is not subject to the Coast Guard's Inspection and Certification authority. 46 U.S.C. § 2101(43).

issued by a United States Magistrate after Red Star had refused the Compliance Officer's request to inspect the tugboat for safety and health violations. As a result of that inspection, the Secretary of Labor, the statutory head of OSHA, cited Red Star with violations of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. § 651, *et. seq.*, (1982) (OSH Act). In particular, the Secretary alleged violation of 29 C.F.R. § 1910.95, in that, Red Star had failed to provide protection against excessive noise levels, and had failed to administer a continuing hearing conservation program.

*The Administrative Proceedings*

Red Star contested the Secretary's allegations and pursued the available administrative remedies. Subsequent to the first hearing, in a decision dated July 13, 1982, the OSHA Administrative Law Judge (ALJ) upheld the Secretary's actions, and rejected Red Star's contentions that OSHA lacked jurisdiction, and that the warrants were invalid. Red Star petitioned the Commission for discretionary review. On review, the Commission upheld the validity of the warrants, and remanded, for reconsideration by the ALJ, the question of jurisdiction in light of *Dillingham Tug & Barge Corp.*, _____ OSAHRC _____, 10 O.S.H. Cas. (BNA) 1859, 1982 O.S.H. Dec. (CCH) ¶ 26,166 (1982). In *Dillingham*, the Commission found that "the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters." *Id.* at ____, 10 O.S.H. Cas. (BNA) at 1861, 1982 O.S.H. Dec. (CCH) at 32,996. Hence, since "section 4(b)(1) precludes the Secretary from enforcing the OSH Act with respect to [the] working

conditions" of "seamen" aboard vessels operating on the navigable waters, the Commission held that the Coast Guard had exclusive jurisdiction. *Id.* at _____, 10 O.S.H. Cas. (BNA) at 1860, 1982 O.S.H. Dec. (CCH) at 32,995.

Pursuant to the remand order, a second hearing, which consisted largely of the testimony of a Coast Guard officer, was held on February 9, 1983. Based upon that testimony, the regulations found in 46 C.F.R., Chapter I, and the Commission's decision in *Dillingham*, the ALJ reversed his prior decision, and held that since the Coast Guard had jurisdiction, OSHA could not enforce its regulations in this case. Since the Commission did not act upon the Secretary's petition for discretionary review of the decision on remand, on June 23, 1983, by operation of section 12(j) of the OSH Act, 29 U.S.C. § 661(i), the ALJ's decision became a final order of the Commission.

Pursuant to sections 11(a) & (b) of the OSH Act, 29 U.S.C. §§ 660 (a) & (b) (1982), the Secretary seeks judicial review of the determination that OSHA does not have jurisdiction over the working conditions of "seamen" aboard uninspected vessels. Red Star, by cross-petition, seeks review of that part of the Commission decision which upheld the validity of the *ex parte* warrant.

## *Standard of Review*

The OSH Act applies to all employment performed in workplaces located within the several states; the District of Columbia; Puerto Rico; the Virgin Islands; Samoa, Guam, Wake and Johnston Islands; the Trust Territory of the Pacific Islands; and on the Outer Continental Shelf lands. Section 4(a), 29 U.S.C. § 653(a). Unless engaged in the field of nuclear or atomic energy, a private employer

is not exempt from the OSH Act. The only exception is when a sister federal agency is vested with the statutory authority to prescribe or regulate occupational safety or health matters within its purview. Section 4(b)(1), 29 U.S.C. § 653(b)(1).

In this case, the Commission vacated OSHA's citation of the STAMFORD for noncompliance with its occupational noise regulation, on the ground that the Coast Guard comprehensively regulates the working conditions of employees aboard uninspected vessels on navigable waters. In *Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119 (2d Cir. 1978), this Court considered the question of the exemption pursuant to section 4(b)(1), and held that it is a mixed question of "law and fact." *Id.* at 122.

The applicable standard of review for questions of fact is specified in section 11(a) of the OSH Act, 29 U.S.C. § 660(a), which provides that the findings of the Commission "if supported by substantial evidence on the record considered as a whole, shall be conclusive." *Id.* As to questions of law, however, the court is free to determine whether the Commission's legal conclusion is "in accordance with law." 5 U.S.C. § 706(2)(a). It is, of course, the function of the court to ascertain the meaning of the pertinent legislation, and to give effect to the legislative purpose. Nevertheless, judicial authority teaches that, even in cases of statutory interpretation and application, appropriate weight must be given to the interpretation of a statute by the agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). *Accord Tyson v. Maher*, 523 F.2d 972, 974 (2d Cir. 1975). This standard has been followed by other circuits in an occupational health and safety context. *See Dunlop v. Rockwell International*, 540 F.2d 1283, 1289-90 (6th Cir. 1976) (defer-

ring to the Commission's construction of the Act despite the Secretary's contrary view). *Accord GAF Corp. v. OSHRC*, 561 F.2d 913, 915 (D.C. Cir. 1977) (deferring to administrative interpretation of OSHA regulations when the Secretary and the Commission agreed).

*Jurisdiction*

The first question presented requires the interpretation of section 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1) (1982). This section provides that:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

*Id.*

The Commission agrees that a correct interpretation of section 4(b)(1) requires an actual exercise of delegated statutory authority. We differ with the Commission, however, on the issue of whether the Coast Guard has actually exercised the authority conferred. Thus, the question presented does not involve an ordinary question of fact, but rather, the interpretation and application of the statutes and regulations applicable to the authority and responsibilities of the Coast Guard.

It is undisputed by the parties that the Coast Guard possesses extensive statutory authority, and is the agency primarily responsible for maritime safety. Section 2 of Title 14 provides that the Coast Guard "shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the

United States covering all matters not specifically delegated by law to some other executive department . . . ." *Id.* Numerous sections of Title 46 of the United States Code also grant specific authority to the Coast Guard. *See, e.g.*, 46 U.S.C. §§ 3301-18 (governing inspection of vessels). The proposition that Congress intended the Coast Guard to be primarily responsible in the area of maritime safety is supported by the legislative history of the recent amendments to Title 46. H.R. Rep. No. 338, 98th Cong., 1st Sess., *reprinted in* 1983 U.S.Code Cong. & Ad. News 924.

It is equally clear, however, and also undisputed by the parties, that the Coast Guard does not exercise and has not exercised any statutory authority to regulate noise hazards aboard uninspected vessels such as the STAMFORD. In fact, the Coast Guard has historically viewed its authority to regulate uninspected vessels as limited to the regulation of life-saving and fire fighting equipment, backfire flame control, ventilation, the reporting of casualties and the licensing of operators. In the past, the Coast Guard had made several attempts to obtain additional grants of authority from Congress in order to regulate more comprehensively the uninspected fleet. *See, e.g.*, Marine Safety Program: Hearings on H.R. 3486 before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 98th Cong., 1st Sess. 466-68 (1983) (statement of Admiral James S. Gracey, Commandant, U.S. Coast Guard). Indeed, in his testimony before the House Subcommittee on Coast Guard and Navigation, Admiral Gracey, Commandant of the Coast Guard, specifically requested additional authority over uninspected vessels: "We . . . need some statutory authority [to regulate uninspected vessels]. We don't have that now." *Id.* at 467. Congressional inaction on this suggestion, most notably the failure to

provide additional authority to regulate towing vessels, clearly evidences an unwillingness to expand the Coast Guard's authority over the uninspected fleet. Hence, it cannot be questioned that there is a significant distinction between "uninspected" vessels and "inspected and certificated" vessels, in that the regulations affecting "inspected and certificated" vessels are more numerous, extensive, and pervasive than those affecting "uninspected" vessels.

Notwithstanding an exhaustive search, we have been unable to discover any provision in the United States Code, or the Code of Federal Regulations which addresses the Coast Guard's authority to regulate noise hazards aboard uninspected vessels. We do, however, take judicial notice of the fact that the Coast Guard has issued *recommendations* on the control of excessive noise in *Navigation and Vessel Inspection Circular* 12-82, dated June 2, 1982. It is important to note that this circular was promulgated after the events which led to this litigation, and, by its terms, was directed toward inspected and not uninspected vessels.

Thus, we are faced with the question whether, under section 4(b) of the OSH Act, the regulatory authority of the Coast Guard ~~in maritime~~ matters preempts OSHA's statutory authority to regulate a hazard aboard a vessel not addressed by the Coast Guard.

Although not in issue, the Secretary concedes that the pervasive regulations by the Coast Guard of safety and health matters aboard *inspected* vessels eliminates or excludes OSHA's jurisdiction over those vessels.[2] The

---

[2] In accordance with a "Memorandum of Understanding" signed by the Commandant of the Coast Guard and the Assistant Secretary for Occupational Safety and Health, Department of Labor, the Secretary has taken the position, that "the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard *inspected* vessels," and that OSHA may not enforce its regulations with respect to "seamen" aboard *inspected* vessels.

Secretary, however, maintains that the Coast Guard has not "comprehensively exercised," within the meaning of section 4(b), statutory authority as to the working conditions, particularly noise hazards, of "seamen" aboard uninspected vessels. The Secretary contends that comprehensive regulation is required to justify an industry-wide exemption from OSHA regulation. On the other hand, Red Star contends that the Coast Guard has exercised jurisdiction over some matters affecting the health and safety of its "seamen" aboard the STAMFORD, an uninspected vessel, and that preemption may occur even though the Coast Guard has chosen to regulate less stringently than OSHA.

Were this to be a case of first impression, it would seem clear that noise is a "working condition" within the plain meaning of section 4(b)(1), and that the Coast Guard has not "exercised" statutory authority over noise aboard uninspected vessels. It would follow, therefore, that the OSHA regulations would apply. Similar issues, however, have been presented to a number of circuit and district courts which have not interpreted section 4(b)(1) consistently.

In *Marshall v. Northwest Orient Airlines, Inc.*, *supra*, this Court held that section 4(b)(1) was not intended "to eliminate OSHA's jurisdiction merely on the basis of hypothetical conflicts," nor "designed to provide wholesale exceptions for entire industries." *Id.* at 122. Accordingly, this Court held that "a sister agency must actually be *exercising* a power to regulate safety conditions in order to preempt OSHA." *Id.* (emphasis in original).

Other circuits have agreed with the interpretation that the term "exercise," as used in section 4(b)(1) of the Act, requires an actual, concrete assertion of regulatory authority as opposed to a mere possession of authority.

Furthermore, the decisions teach that section 4(b)(1) was not intended to create industry-wide exemptions based on isolated or narrow exercises of statutory authority. In *Southern Ry. Co. v. OSHRC*, 539 F.2d 335 (4th Cir.), *cert. denied*, 429 U.S. 999 (1976), the Fourth Circuit demonstrated that this view of section 4(b)(1) was indeed the intent of Congress. *Id.* at 336-37. *See also Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 390 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Baltimore & Ohio R.R. Co. v. OSHRC*, 548 F.2d 1052, 1054 (D.C. Cir. 1976). We agree that the term "exercise," as used in section 4(b)(1) of the Act, requires more than isolated regulations peripherally affecting the working condition of employees.

Red Star cites authority for the proposition that, because of pervasive regulation by the Coast Guard of working conditions on board vessels in navigation, there is, for "seamen," an industry-wide exemption from OSHA regulation. We reject this contention. First, the authorities relied upon are distinguishable, and, furthermore, most of the opinions cited did not address the considerable variation in the pervasiveness of Coast Guard regulation between inspected and uninspected vessels.

In *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983), the question was whether section 11(c) of the OSH Act could be enforced as to "seamen." Although the Fifth Circuit deferred to the Commission's opinion in *Dillingham*, which held that OSHA lacked jurisdiction over the working conditions of "seamen" aboard uninspected vessels, it also found an actual conflict with the Coast Guard's scheme of regulation. The court held that "the parallel but divergent protective plan of 11(c) would be precisely the sort of duplication [by sister federal agen-

cies] that the Congress meant to forbid by enacting Section 4(b)(1) of OSHA." *Id.* at 829.

The *Texaco* opinion was based in part on an earlier Fifth Circuit opinion, *Clary v. Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980), which not only deferred to Commission precedent, but also based its decision on a ground independent of section 4(b)(1). *Clary* involved a Jones Act suit in which the plaintiff alleged he was injured as a result of several violations of OSHA regulations. These violations, he argued, constituted negligence *per se*. The court examined those regulations and concluded that they were intended to cover only certain specific situations, and did not apply to the situation which occasioned the plaintiff's injury. *Id.* at 1122.

In support of its position, Red Star also refers to the following language quoted from *Taylor v. Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980):

> The Coast Guard has responsibility for the safety of "seamen" under the regulations issued by it, whereas the Department of Labor, under OSHA, has statutory responsibility for the safety of longshoremen at work under regulations issued by it. The respective responsibilities, thus established, are exclusive. This exclusivity is expressly declared in connection with longshoring; it is implicit so far as seamen are concerned.

*Id.* at 93. In *Taylor*, the question was whether certain Coast Guard regulations applied to "longshoremen," not whether OSHA regulations applied to "seamen" aboard uninspected vessels. Again, the court did not consider the void or *lacunae* which existed by virtue of the lack of pervasive Coast Guard regulation of working conditions

of employees aboard uninspected vessels. Hence, *Taylor* cannot be said to have precedential authority.

Finally, Red Star relies on the following quotation from *Barger v. Mayor & City Council of Baltimore*, 616 F.2d 730 (4th Cir.), *cert. denied*, 449 U.S. 834 (1980): "In 29 C.F.R. § 1910.5(b), the Labor Department placed outside the reach of the regulations employees whose occupational safety and health are within the statutory jurisdiction of other federal agencies. The Coast Guard is empowered to lay down health and safety rules for Jones Act seamen . . . ." *Id.* at 732. It is clear that 29 C.F.R. § 1910.5(b) is simply a restatement of section 4(b)(1) of the OSH Act. It does not in any way alter our view that mere possession of statutory authority is insufficient to preempt OSHA, and that section 4(b)(1) requires an actual, concrete exercise of that authority. We, therefore, hold that noise aboard an uninspected vessel is a working condition which is not regulated by the Coast Guard.

We realize that our holding is contrary to the opinion expressed by the Commission in *Dillingham*. In precluding OSHA jurisdiction in *Dillingham*, the Commission rejected the distinction between inspected and uninspected vessels, and justified its view on the basis of the few Coast Guard regulations that applied to uninspected vessels.

In our view, isolated Coast Guard regulations, such as the load line statute, 46 U.S.C. § 88, do not constitute an *exercise* of statutory authority by the Coast Guard, within the meaning of section 4(b)(1), sufficient to oust OSHA of jurisdiction to regulate working conditions for employees aboard uninspected vessels.

While the regulations cited by the Commission in *Dillingham* are safety regulations which pertain to the "seaworthiness" of vessels and the safety of those

aboard, they only incidentally regulate the working conditions of employees. Examples of safety regulations only incidental to the regulation of working conditions are: regulations on the use of petroleum gas, 46 C.F.R. § 25.45-1; ventilation requirements, 46 C.F.R. § 25.40-1; backfire flame control, 46 C.F.R. § 25.35-1; and fire extinguishers, 46 C.F.R. § 25.30. Other regulations merely govern qualifications for a particular employment, for example, the manning requirements found in 46 C.F.R. § 157, and not the working conditions of that employment.

It would do violence to the clear intent of Congress to hold that these instances of Coast Guard regulation of working conditions aboard uninspected vessels would serve to deny an entire class of employees the protection of major safety legislation such as the OSH Act. There can be no doubt that it was the intent of Congress "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). *Accord Marshall v. Western Electric, Inc.*, 565 F.2d 240, 245 (2d Cir. 1977). It is also beyond question that section 4(b)(1) of the OSH Act should be interpreted and applied "to achieve the maximum protection for the industrial workers of the Nation." *Southern Ry. Co.*, 539 F.2d at 338. As recognized by the Supreme Court of the United States, Congress has historically been especially protective of "seamen":

> [W]orkers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by the limits upon their ability to help themselves. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and

watches, wages and return transportation to this country if destitute abroad.

*Southern Steamship Co. v. NLRB*, 316 U.S. 31, 39 (1942) (citation omitted). That this solicitude is longstanding may be noted from many of the provisions of Title 46, Subtitle II, Part G, 46 U.S.C. §§ 10101-11507 (Supp. 1983), entitled "Merchant Seamen Protection and Relief," which date back well over a century.

To agree with the views expressed by Red Star would result in this Court mandating the *status quo*. As a practical matter, this would mean that neither OSHA nor the Coast Guard would exercise authority over the uninspected vessel fleet, to the detriment of those employees exposed to the hazard of excessive noise.

In light of the extensive tradition of congressional concern for mariners, Congress could not have intended that employees aboard uninspected vessels be deprived of the protections accorded the vast majority of American workers by the OSH Act, and those protections offered employees aboard inspected and certificated vessels. It is clear that the Coast Guard's regulation of uninspected vessels is limited to only a few areas. Consequently, it cannot be said that it is exercising jurisdiction sufficient to regulate comprehensively the working conditions of employees aboard uninspected vessels.

Since the Coast Guard is not exercising statutory authority within the meaning of section 4(b)(1) of the OSH Act, we hold that OSHA possesses statutory authority to regulate the working conditions of employees aboard uninspected vessels. Hence, OSHA may regulate noise hazards aboard uninspected vessels.

*Appendix A*

*Ex Parte Warrant*

The second question presented requires that we determine whether the Secretary was empowered to obtain the *ex parte* warrant which authorized the OSHA Compliance Officer to inspect the STAMFORD. The Secretary contends that the version of regulation 1903.4, which was in effect at the time the STAMFORD was inspected, authorized OSHA to obtain *ex parte* warrants. Red Star's assertion that the Secretary was not authorized necessitates an examination of the history of this regulation.

To effectuate the strong congressional policy that every person employed in the United States be afforded a safe working environment, the Secretary of Labor, as statutory head of OSHA, was expressly granted the authority to enter and inspect workplaces for occupational hazards "during regular working hours and at other reasonable times . . . ." Section 8(a), 29 U.S.C. § 657(a). Section 8(g)(2), 29 U.S.C. § 657(g)(2), of the OSH Act also authorizes the Secretary to promulgate rules and regulations necessary to implement this statutory authority.

In 1971, proposed regulation 1903.11, predecessor of regulation 1903.4, was promulgated pursuant to section 8(g). Pursuant to the regulation, a compliance officer was to report the employer's denial of voluntary access to the Area Director, who was to consult with both the Regional Administrator and the Regional Solicitor for the purpose of "promptly seek[ing] appropriate compulsory process." 36 Fed. Reg. 8,376, 8,378 (May 5, 1971). The proposed regulation was subsequently renumbered and adopted, containing a minor alteration which directed the compliance officer to "take appropriate action, including compulsory process, if necessary." *Id.* at 17,851 (Sept. 4, 1971) (current version at 29 C.F.R. § 1903.4 (1983)).

*Appendix A*

Subsequent to the adoption of regulation 1903.4, OSHA issued a series of Compliance and Field Operations Manuals. These manuals, which provide guidance to OSHA compliance officers in enforcing the OSH Act, contained explicit provisions to the effect that inspection warrants would be obtained in appropriate circumstances without advance warning to the affected employer. For example, 2(i) of the original 1972 version of the manual stated that: "[e]xcept in unusual circumstances . . ., there shall be no advance warning to the employer of the fact either that a warrant has been secured or that inspection will take place pursuant to the warrant." In 1976, the manual was amended and excluded 2(f), which dealt with situations where a compliance officer did not have to obtain permission to inspect, but, retained 2(i) with one modification, the term "compulsory process" was substituted for that of "warrant."

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the issue before the Supreme Court was the constitutionality of OSHA's practice of nonconsensual warrantless inspections made pursuant to regulation 1903.4. The Court held that, although no search warrant or other process is expressly required by the OSH Act, OSHA's practice of compelling compliance by nonconsensual warrantless inspections violated the Fourth Amendment. *Id.* at 324.

Since the present case deals with an inspection pursuant to an *ex parte* warrant issued by a United States magistrate, and not a nonconsensual warrantless inspection held unconstitutional in *Barlow's*, an extended discussion of the validity of warrantless inspections is not required. *See Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. Seattle*, 387 U.S. 541 (1967).

However, in *Barlow's* the Supreme Court, in commenting on the alternatives to nonconsensual warrantless in-

spections, appeared to interpret the words "compulsory process," as contained in 29 C.F.R. § 1903.4 (1977), as not including *ex parte* warrants. *See* 436 U.S. at 318. These comments by the Supreme Court, pertaining to whether compulsory process includes *ex parte* warrants, are generally conceded by federal courts to be *dicta.* Nevertheless, in *Cerro Metal Products v. Marshall*, 467 F.Supp. 869 (E.D. Pa. 1979), *aff'd*, 620 F.2d 964 (3d Cir. 1980), the district court found that the Supreme Court's comments in *Barlow's* properly interpreted regulation 1903.4, and held that the Secretary was not empowered to seek *ex parte* warrants. *Id.* at 872. On December 22, 1978, in response to a preliminary injunction issued in the *Cerro Metal* case, and while the *Cerro Metal* proceedings were still pending, the Secretary published a regulation which amended 29 C.F.R. § 1903.4. *See* 43 Fed. Reg. 59,838 (Dec. 22, 1978). The regulation which amended 29 C.F.R. § 1903.4 expressly provided that "compulsory process" included the seeking of *ex parte* warrants. 29 C.F.R. § 1903.4(d). The Secretary published this regulation without meeting the notice and comment provisions of the Federal Administrative Procedure Act, 5 U.S.C. § 553, pursuant to the exemption for "interpretative rules and statements of policy." *Id.* (d)(2).

In *Cerro Metal*, however, District Judge Pollak ruled that since the amendment of December 22, 1978 would "substantially affect[ ] the rights of those over whom the agency exercises authority," it was actually a substantive regulation, and, therefore, was invalidly promulgated. *Id.* at 879-80 (quoting *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974)). A panel of the Court of Appeals for the Third Circuit, with Chief Judge Seitz dissenting, affirmed. The majority opinion stated that the district court correctly distinguished be-

tween interpretative and legislative rules, and found that the regulation in question was a legislative rule "masquerading" as an interpretative rule. 620 F.2d at 981. This view was followed by the Fifth Circuit in *Donovan v. Huffines Steel Co.*, 645 F.2d 288, 289 (5th Cir. 1981), *aff'g mem. Marshall v. Huffines Steel Co.*, 488 F.Supp. 995 (N.D. Tex. 1979), and *Smith Steel Casting Co. v. Donovan*, 725 F.2d 1032, 1034 (5th Cir. 1984). Red Star cites these cases and contends that they express the correct view.

The Secretary, on the other hand, contends that regulation 1903.4 was always intended to include authority to seek *ex parte* warrants; that the Supreme Court's comments in *Barlow's* were non-binding *dicta*; and that, in the alternative, the December 22, 1978 regulation effectively clarified the confusion caused by the Supreme Court's *dicta* in *Barlow's*.

Upon careful review of this important question, we are persuaded by the contentions of OSHA, and disagree with Red Star on several grounds. Furthermore, we feel that both the majority opinion of the Court of Appeals and the District Court in *Cerro Metal* misinterpreted the Supreme Court's discussion of regulation 1903.4 in *Barlow's*. In *Barlow's*, the Supreme Court only held that OSHA's practice of nonconsensual warrantless inspections violated the Fourth Amendment. It did not hold that OSHA did not have the statutory authority to seek *ex parte* warrants. Indeed, in footnote 15 of the *Barlow*'s opinion, the Court stated: "Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed *ex parte* to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for 'compulsory process.' "

*Id.* at 320 n.15. Furthermore, in discussing the alleged threat that obtaining warrants would pose upon the efficient administration of OSHA, the Supreme Court stated that "the Secretary should never have adopted [regulation 1903.4], particularly when the Act does not require it." *Id.* at 319. The confusion stems from the Court's interpretation of the words "compulsory process" as not including *ex parte* warrants. Clearly, these comments were non-binding *dicta*, and we disagree with the view that it was integral to the Supreme Court's holding. *See Cerro Metal*, 467 F.Supp. at 876. While we, of course, agree that the *dicta* of the nation's highest Court merits the greatest deference, we also heed the admonition of Chief Justice Marshall that:

> general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. . . .

*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821), *quoted in*, Re, *Stare Decisis*, 79 F.R.D. 509, 512 (1978). Accordingly, we respectfully decline to follow the Supreme Court *dicta* since upon plenary consideration, a different result is warranted.

We agree with the view expressed by Chief Judge Seitz in his dissent in *Cerro Metal* that "the phrase 'compulsory process' in § 1903.4 is certainly broad enough to encompass ex parte warrants [and that,] the ordinary meaning of that phrase includes ex parte warrants." 620 F.2d at 983 (Seitz, C.J., dissenting). We also agree that dropping 2(f) from the 1976 manual only meant that a compliance officer must first seek the owner's permission before

inspecting the premises. It did not mean that the use of *ex parte* warrants was not contemplated by the 1976 manual. This is supported by the retention of 2(i) in subparagraph (8), pertaining to the element of surprise, which represented a fall-back position in case warrants were required. Indeed, as stated by Chief Judge Seitz, the Supreme Court's *dicta* in *Barlow's* when "[v]iewed in light of [OSHA's] litigation strategy . . . makes sense." *Id.* at 984.

Other circuits which have faced this problem have held that OSHA had the authority to seek *ex parte* warrants, but indicate that the 1978 amendment was necessary for the Secretary to continue to seek them. For example, in *Rockford Drop Forge Co. v. Donovan*, 672 F.2d 626 (7th Cir. 1982), Rockford challenged OSHA's *ex parte* inspection of its premises, claiming that it had no power to obtain an *ex parte* warrant since the 1978 amendment was invalid due to noncompliance with section 4(b) of the Administrative Procedure Act. In holding both the warrant and the amendment valid, the court stated that the Secretary "took advantage of the Supreme Court's suggestion" when it promulgated the 1978 amendment, and that the 1978 amendment was "approved in advance" by the Supreme Court. *Id.* at 630. Similarly, the Tenth Circuit in *Marshall v. W & W Steel, Inc.*, 604 F.2d 1322 (10th Cir. 1979), held that since the 1978 amendment was an interpretative rule, OSHA had the authority to obtain an *ex parte* warrant in that case. *Id.* at 1325-26.

Although we are of the opinion that it was not necessary for the Secretary to amend regulation 1903.4 in order to seek *ex parte* warrants, we do believe that the Secretary's 1978 action is indicative of the position that he has taken consistently and merits discussion. While it is unfortunate that Congress has provided little guidance in

distinguishing interpretative from substantive rules, the case law in this circuit looks to whether a rule "changed existing rights and obligations." *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972); *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975); *Viacom Int'l Inc. v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982). Only rules that do not change "existing rights and obligations" are considered interpretative.

In our view, at the time the 1978 amendment was published, the Secretary was authorized by statute and regulation to seek the *ex parte* warrants, and the sole effect of the 1978 amendment was to dispel the uncertainty caused by the *dicta* in *Barlow's*. The 1978 amendment was therefore nothing more than what it purported to be, an interpretative rule and statement of policy which had no substantive effect on the Secretary's administrative authority and responsibility under the statute. Nor did it alter the rights and duties of any person affected by the OSH Act. This view was expressed by the Ninth Circuit in *Stoddard Lumber Co., Inc. v. Marshall*, 627 F.2d 984, 990 (9th Cir. 1980), and by the Western District of Virginia, which held that the Secretary had always maintained the position that "compulsory process" included *ex parte* warrants. *Matter of Establishment Inspection of Seaward Int'l. Inc.*, 510 F.Supp. 314, 317 (W.D. Va. 1980), *aff'd mem. sub nom Marshall v. Seaward Int'l Inc.*, 644 F.2d 880 (4th Cir. 1981).

It is manifest that the Secretary, despite the perhaps infelicitous rewording of the manuals, had no intention to relinquish or renounce the authority to seek *ex parte* warrants. These changes were made simply to accommodate the procedure of compelling nonconsensual warrantless inspections, found unconstitutional in *Barlow's*, by

replacing "warrant" with the broader and more inclusive words, "compulsory process." Thus, we find that, "compulsory process," as used by the Secretary in the regulation and in subsequent revisions of the manual, was always intended to encompass both the seeking of *ex parte* warrants, and actions to compel compliance with the nonconsensual warrantless inspections declared unconstitutional in *Barlow's*.

Hence, we hold that pursuant to its statutory authority and regulations, OSHA was authorized to seek *ex parte* inspection warrants at the time the STAMFORD was inspected, and that the *ex parte* inspection warrants obtained by OSHA in this case were valid.

*Conclusion*

In view of the foregoing, it is the holding of the court that noise is a "working condition," and, since the Coast Guard is not exercising jurisdiction over the working conditions of employees aboard uninspected vessels operating on navigable waters, OSHA may exercise its jurisdiction. Therefore, that part of the order on appeal which states that OSHA does not have jurisdiction, is REVERSED.

Since we also hold that the *ex parte* warrants obtained by OSHA in this case were valid, that part of the order on appeal which states warrantes were valid, is AFFIRMED.

The case is REMANDED for further proceedings consistent with this opinion.

## APPENDIX B

**Judgment of the United States Court of Appeals**

(Filed—July 10, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of July one thousand nine hundred and eighty-four.

Present:

Hon. Ellsworth A. Van Graafeiland
Hon. William H. Timbers — Circuit Judges
Hon. Edward D. Re — Chief Judge*

83-4158, 83-4168

---

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Petitioner/Cross-Respondent,

—v.—

RED STAR MARINE SERVICES, INC.,

Respondent/Cross-Petitioner.

---

* The Hon. Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

*Appendix B*

Cross petitions for review of an order of the Occupational Safety and Health Review Commission,

These causes came on to be heard on the certified list of items comprising the record of the Occupational Safety and Health Review Commission, and was argued by counsel.

UPON CONSIDERATION THEREOF, it is

ORDERED, adjudged and decreed that the order on appeal be and it hereby is affirmed in part and reversed in part and the action be and it hereby is remanded to the Commission for further proceedings consistent with this opinion.

ELAINE B. GOLDSMITH
Clerk

EDWARD J. GUARDARO
Deputy Clerk

## APPENDIX C

**Decision and Order of the Occupational Safety and Health Review Commission**

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 80-4057

REMAND

---

SECRETARY OF LABOR,

Complainant

v.

RED STAR MARINE SERVICES, INC.

Respondent

---

APPEARANCES:

Paul Katz, Esq., for Complainant

James M. Kenny, Esq., for Respondent

DECISION AND ORDER

This case arose under 29 USC, 651 *et seq.* of the Occupational Safety and Health Act of 1970 (the Act). As

a result of an inspection by the Occupational Safety and Health Administration [OSHA] of the Respondent's premises on March 19, 1980 to May 29, 1980, Citation 1 was issued on or about July 3, 1980, charging that the Respondent violated sec. 5(a)(2) of the Act by the serious violation of the standards at 29 CFR §1910.95(a), (b)(1) and (b)(3) [respectively items 1A-C of Citation #1]; and the other than serious violation of the standard at 29 CFR §1910.145(c)(2) [item 1 of Citation #2].

On July 10, 1980, the Respondent filed Notice of Contest to items 1A-C of Citation #1 and item 1 of Citation #2, and the penalties proposed therefor. The Complainant withdrew item #1B of Citation #1 and Citation #2 . . . Tr. 3, 4.

## BACKGROUND

In the hearing before ALJ Hassenfeld, the Complainant offered evidence tending to prove that the Respondent violated the noise standards at §1910.95(a) and (b)(3) in that there was excessive noise in the engine room of the tugboat "Stamford". The Transcript for October 15 and 16, 1981, disclosed no adequate basis for any ruling concerning section 4(b)(1) of the Act.

Due to the unavailability of Judge Hassenfeld after the 1981 hearing had been completed, the case was assigned to me. Basing my decision on the Transcript, record, and briefs, I found that the cited violations of the standards at §1910.95(a) and (b)(3) had been established and they were affirmed without penalty as other than serious violations.

The case was remanded "for reconsideration in light of Dillingham Tug & Barge Corp." (10 OSHC 1859). The

*Appendix C*

Complainant's motion to re-open the Hearing was granted, "provided that any evidence to be offered is limited to the section 4(b)(1) issue".

The Dillingham case held that, in certain circumstances, section 4(b)(1) can create industry-wide exemptions from the Act. In that case, the vessel involved was an uninspected towboat operating on navigable waters when a seaman working on it was injured. Since the Coast Guard had issued safety regulations in 46 CFR Chapter I, covering a variety of subjects, including supchapter C on uninspected vessels, the Review Commission held that the Coast Guard had both prescribed and enforced regulations governing safe working conditions of seamen aboard a vessel operating on navigable waters; and that the OSH Act applied only insofar as the Coast Guard had not exercised its authority. It was concluded that, since the Coast Guard regulations were directed at protecting the health and safety of seamen, OSHA could not enforce its own regulations covering the same conditions. (Although the towboat involved was "uninspected", footnote 6 stated that there was no distinction between "inspected" and "uninspected" for the purposes of the case.)

CORRECTION OF 1983 TRANSCRIPT

By agreement of the parties, the following changes in the Transcript of February 9, 1983, are made:

Page 5, line 10, "office" to read "official";
Page 16, line 5, "formed" to read "performed";
Page 16, line 10, "Red Start" to read "Red Star";
Page 17, line 19, "with" to read "within";
Page 19, line 25, "weatherhead" to read "letterhead";

## *Appendix C*

Page 24, line 25, "certified issue" to read "certificate issued".

### SEC. 4(b)(1)

"Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

### HEARING ON REMAND

At the hearing of February 9, 1983, the only witness was Coast Guard Lieutenant Splettstoesser, whose assignments included service on board vessels for 12 years as Damage Controlman and Marine Safety Officer since 1976. He testified that, at the time in question, an uninspected vessel is one that is "not required to be inspected under the shipping laws of the United States"; the Stamford was determined to be an uninspected vessel in the Merchant Marine Listing of Vessels, an official Coast Guard publication; there were no Coast Guard regulations on noise to which seamen on uninspected vessels might be exposed; the Coast Guard had no jurisdiction to enforce any noise standards concerning uninspected vessels; the Coast Guard had done a stability analysis of the Stamford, which pertained to the safety of the crew; the Coast Guard investigates accidents and injuries that occur on uninspected vessels; and 46 CFR, par. 92.90-5A provides that accommodations for crews of all vessels shall be insulated from undue noise . . . Tr. 5, 9, 12, 15, 24-27.

*Appendix C*

## DISCUSSION

In the instant case, 46 CFR Chapter I has a great many regulations concerning safety, including sub-chapter C on uninspected vessels. As stated in the Dillingham case: "An examination of the regulations in Subchapter C indicates that the Coast Guard has made provision for protection against a variety of hazards that may arise in the operation of uninspected vessels. Among the subjects regulated are navigation; ventillation; fire protection equipment; life preservers and other lifesaving equipment; the design, construction, and testing of boilers and machinery . . . Thus, the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters."

In my opinion, the Coast Guard's regulations on the health and safety of seamen prohibit enforcement by OSHA of its own regulations covering the same conditions. As pointed out in the Mushroom Transportation case (1 OSHC 1390) and the Northwest Airlines case (8 OSHC 1982) that prohibition prevails even though the other agency's enforcement is not as strict as OSHA's would be.

## ORDER

(1) Having reconsidered the case in the light of Dillingham Tug & Barge Corp., and having found that the evidence clearly establishes that the Coast Guard exercised statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health, items 1A and 1C of Citation #1, together with the penalties proposed therefor, are vacated.

*Appendix C*

(2) Item 1B of Citation #1 and Citation #2 are vacated.

SO ORDERED

FOSTER FURCOLO
Judge, OSHRC

Dated:

Boston, Massachusetts

## APPENDIX D

**Direction for Review and Remand Order of the Occupational Safety and Health Review Commission (August 31, 1982)**

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 80-4057

---

SECRETARY OF LABOR,

Complainant

v.

RED STAR MARINE SERVICES, INC.

Respondent

---

DIRECTION FOR REVIEW AND REMAND ORDER

Pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (the "Act"), the order of Administrative Law Judge Foster Furcolo, affirming items 1A and 1C of a citation for serious violations[1] of the

---

[1] Item 1A alleged a failure to comply with the noise standard at 29 C.F.R. § 1910.95(a); item 1C alleged noncompliance with the noise standard at 29 C.F.R. § 1910.95(b)(3).

Act, is hereby directed for review. For reasons that follow, we remand the matter to the Judge for further consideration.

The matter was originally heard by Administrative Law Judge Barbara Hassenfeld. Respondent filed a motion to dismiss before Judge Hassenfeld on the grounds that (1) the *ex parte* warrants obtained by the Secretary were invalid, and (2) that under Section 4(b)(1)[2] of the Act, it was exempt from the Act because the working conditions of its employees were regulated by the United States Coast Guard. Judge Hassenfeld denied respondent's motion on the grounds that (1) the *ex parte* search warrants obtained by the Secretary were valid, and (2) the Coast Guard had not promulgated any regulations pertaining to the cited working condition.

Judge Hassenfeld's order was allowed to stand when Judge Furcolo issued his decision in this matter. In its Petition for Discretionary Review, respondent reiterates its position that it is exempt from the Act by virtue of Section 4(b)(1) and that the *ex parte* warrants were invalid.[3]

---

[2] Section 4(b)(1), 29 U.S.C. § 653(b)(1), provides in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety of health.

[3] In its Petition for Discretionary Review, respondent also raises issues concerning the credibility of the Secretary's witnesses. In light of our disposition, we do not address these other issues.

*Appendix D*

Regarding the validity of the *ex parte* warrants, the Commission recently held that the versions of 29 C.F.R. § 1903.4 in effect prior to November 8, 1980 authorized the Secretary to obtain *ex parte* search warrants. *Davis Metal Stamping, Inc.*, —— OSAHRC ——, 10 BNA OSHC 1741, 1982 CCH OSHD ¶ 26,134, (No. 78-5775, 1982); *Roberts Consolidated Industries, Inc.*, —— OSAHRC ——, 10 BNA OSHC 1861, 1982 CCH OSHD ¶ 26,135 (Nos. 80-2423, 80-2860, 1982). Accordingly, we find the warrants to be valid.[4]

The Commission recently reconsidered and overruled its decision in *Puget Sound Tug & Barge,* 81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD ¶ 25,373 (No. 76-4905, 1981), *appeals filed,* Nos. 81-7405 and 81-7406 (9th Cir. June 26, 1981); No. 81-4243 (5th Cir. June 24, 1981). In *Dillingham Tug & Barge Corp.*, —— OSAHRC ——, 10 BNA OSHC 1859, 1982 CCH OSHD ¶ 26,166 (No. 77-4143, 1982), the Commission held that Section 4(b)(1) precludes the Secretary from enforcing the Act with respect to the safety of seamen aboard vessels operating on the navigable waters of the United States.

Accordingly, we reverse Judge Furcolo's decision and remand for reconsideration in light of *Dillingham Tug & Barge Corp.*[5]

---

[4] For reasons he expressed in *Davis Metal Stamping, supra,* and *Roberts Consolidated Industries, supra,* Chairman Rowland would find that the *ex parte* warrants obtained by the Secretary were invalid.

[5] Commissioner Cottine would follow the precedent established in *Puget Sound Tug & Barge,* 81 OSAHRC 50/A2, 9 BNA

*(Footnote continued on following page)*

*Appendix D*

SO ORDERED

FOR THE COMMISSION

RAY H. DARLING, JR.
Executive Secretary

Dated: August 31, 1982

---

*(Footnote continued from preceding page)*

OSHC 1764, 1981 CCH OSHD ¶ 25,373 (No. 76-4905, 1981). *See also Dillingham Tug & Barge Corp.*, —— OSAHRC —— 10 BNA OSHC 1859, 1982 CCH OSHD ¶ 26,166 (No. 77-4143, 1982) (Cottine, Commissioner, dissenting). Accordingly, he would find that Judge Hassenfeld properly denied the Respondent's motion to dismiss on the ground that the Coast Guard has failed to promulgate regulations affecting the cited working conditions.

## APPENDIX E

**Decision and Order of the Occupational Safety and Health Review Commission (August 2, 1982)**

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 80-4057

---

SECRETARY OF LABOR,

Complainant

v.

RED STAR MARINE SERVICES, INC.

Respondent

---

APPEARANCES:

Paul Katz, Esq., for Complainant

James M. Kenny, Esq., for Respondent

### DECISION AND ORDER

This case arose under 29 USC, sec. 651 *et seq.* of the Occupational Safety and Health Act of 1970 (the Act).

*Appendix E*

As a result of an inspection by the Occupational Safety and Health Administration (OSHA) of the Respondent's premises on March 19, 1980 to May 29, 1980, Citation 1 was issued on or about July 3, 1980, charging that the Respondent violated sec. 5(a)(2) of the Act by the serious violation of the standards at 29 CFR 1910.95(a), (b)(1) and (b)(3) (respectively items 1A-C of Citation #1); and the other than serious violation of the standard at 29 CFR 1910.145(c)(2) (item 1 of Citation #2).

On July 10, 1980, the Respondent filed Notice of Contest to items 1A-C of Citation #1 and item 1 of Citation #2, and the penalties proposed therefor. The Complainant withdrew item #1B of Citation #1 and Citation #2 . . . Tr. 3, 4.

REOPEN THE CASE?

Due to the unavailability of Judge Hassenfeld after the hearing had been completed, the case was assigned to me. While the Complainant indicated willingness to agree to a decision by me based on the Transcript, Record, and Briefs, the Respondent requested a new hearing so that the credibility of witnesses could be tested. That request is denied for the reasons stated below.

At the hearing on October 15 and 16, 1981, the only witnesses were the OSHA inspection officer (Bocynesky), the Respondent's engineer (Merrill), the OSHA expert industrial hygienist (Ratney), and an OSHA compliance officer (Kaletsky). All were called by the Complainant. Kaletsky's testimony was practically unimportant as he merely authenticated official court documents concerning the search warrant.

*Appendix E*

The Transcript clearly discloses that there was no serious effort to challenge the credibility of any witness either by cross-examination of by other testimony or evidence. In fact, the Respondent's defense seemed to be that the Complainant had not made out a case on the testimony; and, in any event, that the Complainant's evidence should have been suppressed because the search warrant was invalid and illegal. Credibility of any witness was not really in issue.

The Transcript and Record both establish that each party had every full and fair opportunity to present its side of the case at the hearing. It is clear that no question was raised at the trial about the credibility of any witness; nor has there been any need to choose between witnesses. It is also clear that the probability of any change in the facts that might be elicited at a re-hearing seems to be very slight. In those circumstances, it is my opinion that the case should not be reopened. That is particularly true when (as here) it is apparent that any evidence to be offered at the reopening was available to the parties at the original trial.

For the reasons cited, the case will not be reopened but will be decided on the Transcript, Record, and Briefs.

The pertinent sections of the Act and the standards are appended to this decision under appropriate titles.

THE ISSUES:

1. Was the inspection of the "Stamford" legal and valid?

2. Did the noise in the Stamford's engine room exceed that permitted by Table G-16?

*Appendix E*

3. Did the Respondent provide a continued and effective hearing conservation program?

THE INSPECTION:

The Respondent operates a tugboat and marine towing service. Two of its tugboats are the "Stamford" and the "New Haven". As a result of an employee's complaint (Exh. C-1), an OSHA Compliance Officer on May 9, 1980, obtained a search warrant authorizing the inspection of the two tugboats (Exh. C-3, C-6). This warrant stated that it was valid only to May 19th, but the time was apparently extended to May 29th. I find that the warrant was properly issued on May 9th and was extended to include May 29th. It was presented to the Respondent on May 12th. Inspections of the Stamford were made on May 27 and May 29.

On May 14th, the Respondent's assistant office manager (Rosenbaum) told OSHA Compliance Officer Bocynesky that the Respondent would not consent to an inspection of the tugboats. However, on May 15th, Rosenbaum informed Bocynesky that the Respondent had changed its mind and had decided to allow the inspection . . . Tr. 20-32, 42, 43, 54.

The Complainant contended that the inspection was based on a valid Search Warrant or the Respondent's consent or both. I find that the inspection was valid and legal on both grounds.

EXCESSIVE NOISE:

Although the Compliance Officer inspected the tugboat Stamford on both the 27th and 29th of May, the de-

cision in this case is based on the inspection of the 29th because the evidence established that conditions were "normal" or "representative" on that date according to the Respondent's engineer (Merrill), the assistant office manager (Rosenbaum), and "management" whereas "the crew members, the captain and the engineer" said the 27th was not a "normal" day . . . Tr. 146-152, 164, 165.

Because the Respondent's tugboat (the Stamford) is "automated", the engineer does not have to spend all his time in the engine room but merely monitors instruments outside the engine room that alert him to any problem that requires his presence in it . . . Tr. 117. The uncontradicted testimony of the Respondent's engineer (Merrill) tended to establish that he usually spent over two hours in the engine room during a six hour shift . . . Tr. 123, 124, 127.

Merrill testified that he wore earmuffs 99% of the time in the engine room; and that other employees who merely passed through it did not normally wear earmuffs . . . Tr. 115, 116.

The testing was performed with a general radio noise dosimeter and a sound level meter. The dosimeter was set at A scale, slow response, and was calibrated . . . Tr. 58-62. On both May 27th and May 29th, the tests clearly established that the engineer (Merrill) was exposed to excessive noise in the engine room. On May 29th, the dosimeter was worn for 322 minutes and recorded a decibel percentage reading of 385.6%, or 104.5 decibels, which exceeded the limit allowed in Table G-16. For Merrill's entire time on May 29th, the decibel percentage reading was 435.1%, or 99.96 dBA. Although

that volume of noise is allowable for only two hours, Merrill was exposed to it for over eight hours (525 minutes) . . . Tr. 78-90.

HEARING CONSERVATION PROGRAM:

The uncontradicted evidence established that the Respondent did not have a continued and effective hearing conservation program. Compliance Officer Bocynesky testified that the Respondent's office manager (Smith) said the Respondent had not monitored for noise or given employees audiometric testing . . . Tr. 113. The Complainant's well-qualified expert (Ratney) testified that audiometric testing is the only real quality control and is a very important part of any hearing conservation program. He pointed out that it costs $5 to $15 per employee . . . Tr. 238, 239. Obviously, such a program is easily feasible.

INJURY:

In my opinion, there was not sufficient evidence to establish a "substantial probability that death or serious physical harm could result". As a result, I find that the violation was merely "other than serious".

FINDINGS OF FACT:

Having read the Transcript, Record, and Briefs, and examined the exhibits, the following Findings of Fact are made:

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines.

2. As concerns Items #1A & C of Citation #1, an employee was exposed to sound levels exceeding those

listed in Table G-16, and a continuing, effective hearing conservation program was not administered.

3. The conditions described in Items #1A & C of Citation #1 exposed the Respondent's employee to sustaining harm because of the hazard of noise creating deafness.

4. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that an employee was exposed to such hazard.

CONCLUSIONS OF LAW

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and the Occupational Safety & Health Review Commission has jurisdiction over the subject matter of the parties.

2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have known, of the alleged violation.

3. On the date in question, the Respondent was not in compliance with the standards at 29 CFR 1910.95(a) and (b)(3); and the Complainant has sustained the burden of proving the Respondent violated sec. 5(a)(2) of the Act (sec. 654).

4. The Complainant has not sustained the burden of proving the Respondent violated the standards at 29 CFR 1910.95(b)(1) and 29 CFR 1910.145(c)(2), respec-

tively item 1B of Citation #1 and item 1 of Citation #2.

ORDER

The whole record having been considered, and due consideration having been given to 29 U.S.C., sec. 666(j), it is ordered:

1. Items 1A and 1C of Citation #1 are affirmed, without penalty, as other than serious violations.

2. Item 1B of Citation #1 and Citation #2 are vacated.

FOSTER FURCOLO
Judge, OSHRC

Dated: August 2, 1982
Boston, Massachusetts

*Appendix E*

## APPENDIX

## THE ACT

*Section 654* [section 5(a)(2)] Employer "shall comply with occupational safety and health standards . . ."

*Section 666* [section 17(c)] ". . . employer who has received a citation for a violation of . . . this Act . . . specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation."

*Section 666* [section 17(j)] ". . . assess all civil penalties . . . giving due consideration to . . . the size of the business . . . gravity of the violation, the good faith of the employer, and the history of previous violations."

*Section 666* [section 17(k)] ". . . a serious violation shall be deemed to exist . . . if there is a substantial probability that death or serious physical harm could result . . . unless the employer did not, and could not . . . know of the presence of the violation."

## THE STANDARDS

*1910.95(a):* "Protection against the effects of noise exposure when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response . . ."

*Appendix E*

*1910.95(b)(3):* Where there is excessive sound, "a continuing, effective hearing conservation program shall be administered."

*Appendix E*

(SEAL)

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K Street, NW
Washington, D.C. 20006

September 1, 1982

OSHRC Docket No. 80-4057

---

IN REFERENCE TO SECRETARY OF LABOR

v.

RED STAR MARINE SERVICES, INC

---

Notice is hereby given to the following:

Of Direction For Review and Remand Order

To wit: See attached.

FOR THE SECRETARY OF LABOR

Counsel for Regional Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., NW.—Rm. S-4014
Washington, D.C. 20210

*Appendix E*

Albert H. Ross, Esq.
Regional Solicitor, USDOL
John F. Kennedy Federal Bldg.
Government Center—Rm. 1803
Boston, Mass 02203

FOR EMPLOYER

James M. Kenny, Esq.
McHugh, Leonard & O'Conor
80 Pine Street
New York, N.Y. 10005

FOR EMPLOYEES

Judge Foster Furcolo
OSHRC
John W. McCormack Post Office
& Courthouse, Rm 420
Boston, Mass 02109

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

## APPENDIX F

**Summary and Order of the Occupational Safety and Health Review Commission**

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 80-4057

SECRETARY OF LABOR,
Complainant

v.

RED STAR MARINE SERVICES, INC.
Respondent

SUMMARY AND ORDER

Respondent has brought a motion to dismiss the above-entitled case on two premises; the first is that OSHA has no jurisdiction and the second is that the search warrant is invalid.

The Respondent has claimed that the Complaint should be dismissed as OSHA lacks jurisdiction because its authority doesn't extend to employment performed on navigable waters and that the tugboat in question is regulated

by the U. S. Coast Guard. The Respondent contends that since the Coast Guard is a Federal agency that the tugboat employees are not covered by OSHA because 29 USC 653(b)(1) states "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . *exercise statutory authority or prescribe* or *enforce standards or regulations* affecting occupational safety or health." (emphasis supplied).

The Complainant argues that the Jones Act, 46 U.S.C. 688 applies to recovery from injuries sustained at work and not to control of noise at the work site. The Respondent relies on the fact that seamen are covered by the Jones Act as proof that OSHA has no jurisdiction over the instant matter and cites cases which deal with damages for injury to persons covered by the Jones Act. The OSHA regulations do not exclude seamen as relates to noise control and the U.S. Coast Guard does not regulate that problem as it does the testing and inspection of carbon dioxide extinguishing equipment and electrical equipment installed on board vessels as the facts indicate occurred when Judge Henry Osterman dismissed certain citations in *Secretary of Labor* v. *Ohio Barge Lines,* OSHRC Docket Nos. 78-2724, 78-2725. Since no other Federal regulations protect seamen from noise problems, I find that OSHA has jurisdiction in the instant case.

On its claim that the warrant was faulty, the Respondent states that it is so because: it's ex parte, not based on probable cause and too broad. It has been held that the Court will defer to the Occupational Safety and Health Review Commission, the review of the employer's challenge to the warrant and manner of inspection. *Bab-*

*cock & Wilcox* v. *Marshall,* (D.C. Pa. 1979) 7 OSHC 1315. The Secretary has the authority to obtain a warrant ex parte and a magistrate may not permit the employer to appear and contest the issuance of a warrant. *S.D. Warren, Division of Scott Paper,* (D.C. Maine 1979) & OSHC 2010 at 2011. According to that Court, "employer participation at a warrant application hearing not only would frustrate congressional policy as expressed in the Act, but also would seriously impede the efficiency of inspection that is necessary in any administrative search." *Id.* at 2013.

The law allows the Secretary of Labor to make a special inspection of the employer's premises upon the receipt of an employee's or employee representative's complaint. 29 U.S.C. 657(f) The United States Supreme Court held that it violated the fourth amendment of the Constitution if the search were warrantless (unless prior consent). However, the Supreme Court stated that "For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular (establishment) *Marshall* v. *Barlows,* (U.S. Supreme Court 1978) 6 OSHC 1571, at 1575, 1576. The Court in *Marshall* v. *North American Car Company,* (D.C. M.D. Pa. 1979) 7 OSHC 1551 at 1554 stated that "a specific employee complaint may form the basis for a finding that sufficient cause exists to issue an administrative warrant." Here the facts indicate that the inspection was initiated by employee complaint, a copy of which the Complainant provided to the Respondent.

*Appendix F*

This case can be distinguished from the facts in *Marshall* v. *North American Car Company*, supra at 1555, where the Court found the warrant issued was too broad as it authorized a general inspection of the entire area of the Respondent's operations on the basis of an employee complaint as opposed to a warrant based on a general administrative plan for inspection. The Court felt that the warrant should have been limited to areas identified in the employees complaint. Here the area inspected is the "Tugboat Stamford" and is clearly distinguishable from an entire plant of North American Car Co.

I thus find the warrant and its issuance proper and valid.

The Respondent's motion to dismiss is DENIED.

BARBARA L. HASSENFELD
Judge, OSHRC

Dated: January 27, 1981
Boston, Massachusetts

Supreme Court, U.S.
FILED
OCT 22 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-590

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

RED STAR MARINE SERVICES, INC.,
*Petitioner,*

*vs.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
*Respondent.*

**SUPPLEMENTAL BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 22.6**

JAMES M. KENNY
*Attorney for Petitioner*
80 Pine Street
New York, New York 10005
(212) 422-0222

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | ii |
| SUPPLEMENTAL BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 22.6 | 1-3 |
| CONCLUSION | 3 |

PAGE

## *Table of Authorities*

### Cases Cited

Barger v. Mayor & City Council of Baltimore, 616 F.2d 730 (4th Cir. 1980) ..... 2, 3

Clary v. Ocean Drilling and Exploration Co., 609 F. 2d 1120 (5th Cir. 1980) ..... 2

Donovan v. Texaco, 720 F.2d 825 (5th Cir. 1983) ..... 2

Kopczynski v. The Jacqueline, —— F.2d —— (9th Cir. 1984) ..... 1, 2

Taylor v. Moore-McCormack Lines, Inc., 421 F.2d 88 (4th Cir. 1980) ..... 2

### Statutes Cited

Occupational Safety and Health Act (1970):

Sec. 4(b)(1) ..... 2

29 U.S.C.:

Sec. 653(b)(1) ..... 2

46 U.S.C. (Jones Act):

688 ..... 2

### Other Authority Cited

Merchant Vessels of the United States, 1980 (United States Department of Transportation, United States Gov't Printing Office), Vols. I & II, 2305, 140, 1005 and 1220 ..... 3

NO. 84-590

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

RED STAR MARINE SERVICES, INC.,

*Petitioner,*

*vs.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

*Respondent.*

## SUPPLEMENTAL BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 22.6

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner Red Star Marine Services, Inc. calls the attention of the Court to a new case which further demonstrates the conflict of the decision below with the decisions of other Courts of Appeal on the issue of the jurisdiction of the Occupational Health and Safety Administration (OSHA) to regulate the workplaces of seamen.

The Ninth Circuit on September 11, 1984, in *Kopczynski* v. *The Jacqueline** (not yet reported), refused to extend

* The vessel Jacqueline, United States Coast Guard documentation number 519060, is 42 gross tons and is an uninspected vessel. The vessel's homeport is Los Angeles, California. (To confirm that the vessel is uninspected, call Coast Guard documentation section Los Angeles—213-590-2392.)

OSHA jurisdiction to regulate the working conditions of seamen. The Court of Appeals in *Kopczynski*, an action for seaman's personal injuries, brought under the *Jones Act* 46 U.S.C. 688, upheld the District Court's refusal to charge the jury that an OSHA regulation governing the use of gangways or ladders on vessels was a standard of care applicable to seamen. The Ninth Circuit interpreted Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §653(b)(1) and relied upon the fact that "The Coast Guard is the primary federal agency which exercises authority over the working conditions of seamen" to exclude OSHA from regulating the workplace of seamen aboard vessels. The Ninth Circuit decision cited as authority for its ruling, *Donovan* v. *Texaco,* 720 F.2d 825 (5th Cir. 1983); *Clary* v. *Ocean Drilling and Exploration Co.,* 609 F.2d 1120 (5th Cir. 1980) and *Taylor* v. *Moore-McCormack Lines, Inc.,* 421 F.2d 88 (4th Cir. 1980).

The decision below will expose vessel operators in the Second Circuit to *Jones Act* claims by seamen on uninspected vessels based upon violation of OSHA regulations with the concomitant strict liability implications of the doctrine of negligence *per se* while similar vessel operators in the Fourth, Fifth and Ninth Circuits have no such exposure. Certainly, Second Circuit vessel operators will be at a financial disadvantage as a result of increased insurance costs arising out of that fertile field for maritime personel injury litigation, the *Jones Act.*

There is no doubt that the Fourth Circuit, pursuant to the decision in *Barger* v. *Mayor & City Council of Baltimore,* 616 F.2d 730 (4th Cir. 1980), has held the subject OSHA noise regulations inapplicable to seamen. In *Barger,* city firemen of Baltimore, who are seamen, sued for hearing loss as a result of exposure to noise on city fireboats. Baltimore has four fireboats: 1) P.W. WILKINSON, 93 gross

tons; 2) AUGUST EMRICH, 93 gross tons; 3) MAYOR J. HAROLD GRADY, 93 gross tons; and 4) MAYOR THOMAS DALESSANDRO, JR., 149 gross tons. See *Merchant Vessels of the United States*, 1980 (United States Department of Transportation, United States Gov't Printing Office), Vols. I & II, 2305, 140, 1005, and 1220. All of these boats are less than 300 gross tons and are uninspected vessels like the subject vessel, the STAMFORD. The ruling of the Fourth Circuit in *Barger*, therefore, could not be in more direct conflict with the decision below of the Second Circuit.

## CONCLUSION

**For these reasons and the reasons stated in the Petition, a writ of certiorari should issue to review the opinion of the Second Circuit.**

Respectfully submitted,

JAMES M. KENNY
*Attorney for Petitioner*
80 Pine Street
New York, New York 10005
(212) 422-0222

October 22, 1984

FILED
JAN 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-590

# In the Supreme Court of the United States

OCTOBER TERM, 1984

---

RED STAR MARINE SERVICES, INC., PETITIONER

*v.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

---

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

FRANCIS X. LILLY
*Solicitor of Labor*

KAREN I. WARD
*Associate Solicitor*

ALLEN H. FELDMAN
*Counsel for Appellate Litigation*

BARBARA J. JOHNSON
*Attorney*
*Department of Labor*
*Washington, D.C. 20210*

## QUESTION PRESENTED

Whether the Occupational Safety and Health Administration retains jurisdiction to enforce a noise control standard, 29 C.F.R. 1910.95, promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, aboard an uninspected vessel in navigable waters, where no other federal agency has exercised authority to regulate the particular hazard or to regulate generally the working conditions of seamen aboard uninspected vessels.

## TABLE OF CONTENTS


Page

Opinions below ..... 1

Jurisdiction ..... 1

Statement ..... 2

Argument ..... 5

Conclusion ..... 13

Appendix ..... 1a


## TABLE OF AUTHORITIES

Cases:


*Baltimore & O.R.R.* v. *OSHRC*, 548 F.2d 1052 ..... 7, 9

*Barger* v. *Mayor & City Council*, 616 F.2d 730, cert. denied, 449 U.S. 834 ..... 11

*Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 ..... 10, 11

*Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d 913 ..... 6, 7

*Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 ..... 3, 4, 12, 13

*Donovan* v. *Texaco, Inc.*, 720 F.2d 825 ..... 10

*Ensign-Bickford Co.* v. *OSHRC*, 717 F.2d 1419, cert. denied, No. 83-1182 (Apr. 16, 1984) ..... 6

*Kopczynski* v. *The Jacqueline*, 742 F.2d 555 ..... 12

*Layne & Bowler Corp.* v. *Western Well Work, Inc.*, 261 U.S. 387 ..... 10

Page

Cases—Continued:

*Marshall* v. *Northwest Orient Airlines, Inc.*, 574 F.2d 119 ..... 6

*Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161 ..... 7

*PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890 ..... 6, 7

*Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386, cert. denied, 434 U.S. 874 ..... 6, 7, 8, 9

*Southern Ry.* v. *OSHRC*, 539 F.2d 335, cert. denied, 429 U.S. 999 ..... 6, 7, 9, 11

*Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 ..... 11

*U.S. Air, Inc.* v. *OSHRC*, 689 F.2d 1191 ..... 8

*Velasquez* v. *Southern Pacific Transportation Co.*, 734 F.2d 216 ..... 7

*Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 ..... 6, 12, 13

Statutes and regulations:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* ..... 12

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* :

§ 4(b)(1), 29 U.S.C. 653(b)(1) .... 3, 5, 6, 10, 11
§ 5(a)(2), 29 U.S.C. 654(a)(2) ..... 2
§ 6(a), 29 U.S.C. 655(a) ..... 12

Page

Statutes and regulations—Continued:

§ 11(b), 29 U.S.C. 660(b) ..... 4
§ 12(j), 29 U.S.C. 661(j) ..... 4
§ 17(k), 29 U.S.C. 666(k) ..... 2

Pub. L. No. 98-89, § 1, 97 Stat. 500 *et seq.* :

97 Stat. 504 (to be codified at 46 U.S.C. 2101(33)) ..... 2

97 Stat. 510 (to be codified at 46 U.S.C. 3301(7)) ..... 2

97 Stat. 537 (to be codified at 46 U.S.C. 6301) ..... 4

29 C.F.R. :

Pt. 1903:

Section 1903.4 (1978) ..... 3

Pt. 1910:

Section 1910.95(a) ..... 2
Section 1910.95(b)(3) (1980) ..... 2
Section 1910.95(c)-(p) ..... 2

Pt. 1915:

Section 1915.2(b) ..... 12

Pt. 1918:

Section 1918.1 ..... 12

33 C.F.R. :

Pts. 60-76 ..... 8-9
Pt. 80 ..... 8
Pts. 151-159 ..... 8

Page

Statutes and regulations—Continued:

46 C.F.R. :

Pt. 24 ..... 8
Pt. 25:

Subpt. 25.05 (1982) ..... 8
Subpt. 25.25 ..... 8
Subpt. 25.30 ..... 8

Pt. 26:

Subpt. 26.08 ..... 8
Subpt. 26.25:

Section 26.25-1 ..... 8

Pt. 31 ..... 8

Pt. 42:

Section 42.01-i ..... 8

Pt. 71 ..... 8
Pt. 91 ..... 8

Miscellaneous:

43 Fed. Reg. 59838 (1978) ..... 3

45 Fed. Reg. 14987 (1980) ..... 8

48 Fed. Reg. 11365 (1983) ..... 8

U.S. Coast Guard, *No. 12-82, Navigation and Vessel Inspection Circular* (June 2, 1982) ..... 9

# In the Supreme Court of the United States

OCTOBER TERM, 1984

---

No. 84-590

RED STAR MARINE SERVICES, INC., PETITIONER

*v.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 739 F.2d 774. The opinion of the administrative law judge (Pet. App. 26a-31a) is digested at 1983-1984 O.S.H. Dec. (CCH) ¶ 26,618. The opinion of the Occupational Safety and Health Review Commission (Pet. App. 32a-35a) is digested at 10 O.S.H. Cas. (BNA) 1967. The prior decision of the administrative law judge (Pet. App. 36a-43a) is digested at 1982 O.S.H. Dec. (CCH) ¶ 26,202.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-25a) was entered on July 10, 1984, and the petition for a writ of certiorari was filed on October 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner operates a tugboat and marine towing service on the eastern seaboard of the United States (Pet. App. 3a, 39a). Petitioner's fleet includes the tugboat *Stamford*, an uninspected vessel under Coast Guard standards (*id.* at 8a, 39a).[1] On May 29, 1980, an Occupational Safety and Health Administration (OSHA) compliance officer, pursuant to an ex parte warrant, inspected the *Stamford* for safety and health violations (*id.* at 3a-4a). The compliance officer found that the *Stamford's* engineer was exposed to noise levels exceeding those permitted by regulation and that petitioner did not have a continuing and effective hearing conservation program, despite the fact that audiometric testing could have been implemented at a minimal cost (*id.* at 41a). Respondent Secretary of Labor accordingly cited petitioner with four "serious" violations[2] of Section 5(a)(2) of the Occupational Safety and Health Act (OSH Act or the Act), 29 U.S.C. 654(a)(2).[3]

---

[1]Seagoing motor vessels, such as the *Stamford*, are subject to Coast Guard inspection if their weight exceeds 300 gross tons. See Pub. L. No. 98-89, § 1, 97 Stat. 510, 504 (to be codified at 46 U.S.C. 3301(7), 2101(33)). Because the *Stamford* weighs less than 300 gross tons (Pet. 5), it is classified as an "uninspected vessel." Although the Coast Guard has extensively regulated working conditions on inspected vessels, it has promulgated few regulations pertaining to safety matters on uninspected vessels. See pages 8-9, *infra*.

[2]A "serious" violation "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists * * * unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." § 17(k), 29 U.S.C. 666(k).

[3]Section 5(a)(2) provides that each employer "shall comply with occupational safety and health standards promulgated under this [Act]." Specifically, the Secretary alleged noncompliance with 29 C.F.R. 1910.95(a), the standard requiring employers to provide personal protective equipment for employees exposed to excessive noise, and with former 29 C.F.R. 1910.95(b)(3) (1980) (replaced by 29 C.F.R. 1910.95(c)-(p)), the standard that required an employer to provide an

Petitioner contested the citations, maintaining, inter alia, that OSHA lacked jurisdiction to enforce the Act aboard vessels in navigable waters because the Coast Guard had exercised statutory authority to regulate the working conditions of seamen.[4] Under the Act, OSHA is precluded from regulating the "working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." § 4(b)(1), 29 U.S.C. 653(b)(1). An administrative law judge (ALJ) denied petitioner's motion to dismiss for lack of jurisdiction, finding that the Coast Guard had not regulated the specific working condition at issue — the hazard of employee exposure to excessive noise levels (Pet. App. 49a). A second ALJ affirmed the citations, holding that petitioner knowingly had exposed an employee to the hazard of potentially harmful noise levels in excess of those permitted by regulation and that petitioner had not administered a continuing and effective hearing conservation program (*id.* at 41a-42a).

Petitioner appealed to the Commission, which reversed the ALJ's decision and remanded the case for consideration in light of the Commission's decision in *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982). In that case, a majority of the Commission held that the Secretary

---

effective hearing conservation program for employees exposed to excessive noise. Two additional citations, which were vacated by an administrative law judge (Pet. App. 42a-43a), are not at issue.

[4]Petitioner also argued that the Secretary lacked authority to seek the ex parte warrant authorizing the inspection. Finding that the Secretary's regulation, 29 C.F.R. 1903.4 (1978) (subsequently amended in 43 Fed. Reg. 59838 (1978)), provided specific authority to seek the warrant, the court of appeals upheld the Secretary's action (Pet. App. 16a-23a). Petitioner does not seek review of this portion of the court of appeals' decision.

was precluded from enforcing the Act with respect to "the health and safety of seamen aboard vessels operating on navigable waters," because "the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels." *Id.* at 1860, 1861. *The Dillingham* majority noted that the Coast Guard had taken "remedial action" (*id.* at 1862) to correct the hazard at issue in that case —which had resulted in a seaman's death aboard an uninspected vessel — pursuant to its authority to investigate marine casualties. See 97 Stat. 537 (to be codified at 46 U.S.C. 6301).

On remand in the instant case, the ALJ applied the Commission's holding in *Dillingham* and concluded that because the Coast Guard had promulgated "a great many regulations concerning safety," including some regulations affecting uninspected vessels, the working conditions of all seamen are exempt from the Act's coverage (Pet. App. 30a, 28a). The Commission did not act upon the Secretary's petition for discretionary review, and the ALJ's decision therefore became a final order of the Commission. § 12(j), 29 U.S.C. 661(j).

3. The Secretary sought judicial review of the final administrative decision in the court of appeals, pursuant to Section 11(b) of the Act, 29 U.S.C. 660(b). The court of appeals reversed the Commission's decision, holding that vessels in navigable waters are not entitled to an industry-wide exemption from the Act. In the court's view, the Coast Guard's regulation of uninspected vessels was not sufficiently extensive to constitute the "actual exercise of delegated statutory authority" (Pet. App. 7a) required to defeat OSHA's jurisdiction. In reaching this conclusion, the court found a "significant distinction" between Coast Guard regulation of inspected and uninspected vessels: although "pervasive regulation[] by the Coast Guard of safety and

health matters aboard *inspected* vessels eliminates or excludes OSHA's jurisdiction over those vessels" (*id.* at 9a (emphasis in original and footnote omitted)), the "limited" Coast Guard regulations affecting working conditions of employees on uninspected vessels "do not constitute an *exercise* of statutory authority * * * sufficient to oust OSHA of jurisdiction" (*id.* at 8a, 13a (emphasis in original)).

In examining the extent to which the Coast Guard has regulated working conditions of employees aboard uninspected vessels, the court noted that the Coast Guard does not regulate the hazard of noise in engine rooms and has, in fact, "historically viewed its authority to regulate uninspected vessels as limited to the regulation of life-saving and fire fighting equipment, backfire flame control, ventilation, the reporting of casualties and the licensing of operators" (Pet. App. 8a). The court found these "isolated Coast Guard regulations" (*id.* at 13a), which "only incidentally regulate the working conditions of employees" (*id.* at 13a-14a), far less than the exercise of statutory authority contemplated by Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1). Accordingly, the court concluded, "[i]t would do violence to the clear intent of Congress to hold that these instances of Coast Guard regulation of working conditions aboard uninspected vessels would serve to deny an entire class of employees the protection of major safety legislation such as the OSH Act" (Pet. App. 14a).

## ARGUMENT

The court of appeals correctly applied well-settled legal principles regarding the operation of 29 U.S.C. 653(b)(1) in reaching its conclusion that the Coast Guard's minimal regulation of employee health and safety on uninspected vessels is insufficient to result in a wholesale displacement of OSHA's jurisdiction over working conditions of seamen aboard such vessels. Moreover, the Coast Guard has taken the position, which petitioner does not challenge, that it

does not have statutory authority to regulate other conditions on uninspected vessels, such as the noise conditions on petitioner's tugboat that were determined by OSHA to constitute a serious violation of the Act (App., 1a-3a, *infra*). The result of petitioner's position therefore would be to exclude the employees on petitioner's uninspected vessels from any substantial safety protection. There is no reason to believe that Congress intended to leave such a gap in coverage when it enacted the OSH Act. Review by this Court therefore is unwarranted.

1. As this Court has recognized, the OSH Act is to be "liberally construed to effectuate [its] congressional purpose" "to prevent occupational deaths and serious injuries." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13, 11 (1980) (footnote omitted). Other courts accordingly have interpreted OSHA's jurisdictional reach expansively, concluding that "[e]mployees should not lightly be denied the protection of OSHA" (*Marshall* v. *Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2d Cir. 1978)), and that 29 U.S.C. 653(b)(1) must "be construed to achieve the maximum protection for the industrial workers of the Nation." *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.), cert. denied, 429 U.S. 999 (1976). Accord, *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386, 392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); *Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d 913, 918 (3d Cir. 1980).

Courts interpreting the statutory exemption have found, on the basis of the legislative history and other factors, that OSHA loses jurisdiction only if the sister agency both possesses statutory power to regulate working conditions of employees and actually exercises that power. The "mere existence" of statutory authority is insufficient. *Southern Pacific*, 539 F.2d at 389-391. Accord, *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Southern Ry.*, 539 F.2d at 336-337. The sister agency must actually

take some steps toward exerting its statutory authority to regulate working conditions. See, *e.g., Ensign-Bickford Co.* v. *OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983), cert. denied, No. 83-1182 (Apr. 16, 1984); *Columbia Gas,* 636 F.2d at 918; *Baltimore & O.R.R.* v. *OSHRC*, 548 F.2d 1052, 1055 (D.C. Cir. 1976).

Moreover, the sister agency's exercise of authority must be directed toward working conditions of employees. In determining whether this requirement is met, courts examine both the purpose served by the agency's exercise of authority and the scope of its regulatory activities. The sister agency's regulations must be designed to protect a class of workers, not to effectuate a wholly unrelated goal. See *Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1169 (D.C. 1975). The courts also have rejected the notion that an entire industry is exempt from the OSH Act simply because a sister agency has issued a few regulations affecting the employee class or, indeed, more comprehensive regulations that affect a separate employee class within the broader industry. *Southern Ry.*, 539 F.2d at 339 (railroad employees in offices, shops, and repair facilities, who are unregulated by the Department of Transportation, are not exempt from OSH Act coverage on an industry-wide basis, even though employees in over-the-road operations are more extensively regulated by the Department of Transportation). As one court of appeals has put it, "the phrase 'working conditions' [does not have] a meaning which never appears elsewhere in OSHA — that of 'industries.' " *Southern Pacific,* 539 F.2d at 390. Accord, *Southern Ry.*, 539 F.2d at 339; *Baltimore & O.R.R.*, 548 F.2d at 1054.[5]

---

[5]OSHA's jurisdiction is displaced if the sister agency has addressed the precise hazard at issue, even though it has not done so in the same manner as OSHA. See, *e.g., PBR, Inc.*, 643 F.2d at 896; *Southern*

2. Against this background, the court of appeals correctly concluded that OSHA was not divested of jurisdiction in this case. As an initial matter, petitioner's assertion that the Coast Guard has regulated the working conditions of all seamen is plainly erroneous. The Coast Guard has indeed occupied the field of working conditions aboard inspected vessels,[6] but it has issued only a few regulations that even indirectly affect the working conditions of employees aboard uninspected vessels. As petitioner concedes (Pet. 5-6), the *Stamford* is subject only to regulations governing lifesaving equipment (46 C.F.R. Subpt. 25.25) fire-fighting equipment (46 C.F.R. Subpt. 25.30), navigational warning devices (46 C.F.R. Subpt. 25.05 (1982)),

---

*Pacific*, 539 F.2d at 391. Several courts have further refined the definition of "working conditions." Compare *Southern Ry.*, 539 F.2d at 339 (working conditions include the "environmental area in which an employee customarily goes about his daily tasks"), and *U.S. Air, Inc.* v. *OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982) (same), with *Southern Pacific*, 539 F.2d at 391 (working conditions embrace both "surroundings," expressed as a general problem, and "hazards," expressed as a location, category, or specific item).

Petitioner's sole contention in this case is that the Coast Guard has regulated the working conditions of seamen as a class (Pet. 8-9). Petitioner has not argued that the Coast Guard has jurisdiction in this case because it actually has exercised authority to regulate any specific working condition aboard uninspected vessels. In any event, an examination of the handful of Coast Guard regulations affecting uninspected vessels (see pages 8-9, *infra*) reveals that the Coast Guard has not addressed the specific hazard of noise in engine rooms and has not exercised any authority to regulate generally either engine rooms or noise levels.

[6]Compare 46 C.F.R. Pt. 24 (uninspected vessels), with 46 C.F.R. Pt. 31 (inspection and certification requirements for tank vessels); 46 C.F.R. Pt. 71 (inspection and certification requirements for passenger vessels); and 46 C.F.R. Pt. 91 (inspection and certification requirements for cargo and miscellaneous vessels). Indeed, the Secretary and the Coast Guard have executed memoranda of undertstanding that recognize the pervasive Coast Guard regulation of inspected vessels. See 45 Fed. Reg. 14987 (1980); 48 Fed. Reg. 11365 (1983).

marine casualty reporting (46 C.F.R. Subpt. 26.08), personnel licensing (46 C.F.R. 26.25-1), load lines (46 C.F.R. 42.01-1), nautical "rules of the road" (33 C.F.R. Pt. 80), pollution control (33 C.F.R. Pts. 151-159), and navigational aids (33 C.F.R. Pts. 60-76).[7] Plainly these few regulations affecting uninspected vessels fall far short of the more comprehensive exercise of authority necessary to exempt an entire class of employees from OSH Act coverage. Moreover, as the court below found (Pet. App. 13a-14a), some of these regulations are not even directed at "working conditions," so as to trigger the potential applicability of the exemption. Regulations affecting pollution control, for example, are designed to protect the waters of the United States from discharges of oil and sewage and do not even incidentally protect seamen.

Petitioner does not seriously maintain that the Coast Guard's limited regulation of the uninspected vessel fleet suffices to displace OSHA's jurisdiction. Rather, petitioner appears to merge two discrete classes of employees — those aboard inspected vessels and those aboard uninspected vessels —and concludes that the Coast Guard has regulated the entire industry. This broad conclusion is simply a variation of the notion, consistently rejected by the courts of appeals, that any exercise of authority to regulate working conditions by a sister agency exempts every aspect of the affected industry from OSHA's jurisdiction. See *Southern Pacific*, 539 F.2d at 390; *Southern Ry.* 539 F.2d at 338-339; *Baltimore & O.R.R.*, 548 F.2d at 1054.

---

[7]Although the Coast Guard has issued extensive recommendations addressing noise hazards aboard inspected vessels, U.S. Coast Guard, *Navigation and Vessel Inspection Circular, No. 12-82* (June 2, 1982) (see App., 2a, *infra*), uninspected vessels are under no obligation to comply.

It also is significant that, as the Chief Counsel of the Coast Guard explained in his letter to the clerk of the court of appeals in response to the court's inquiry in this case, the Coast Guard has not issued more comprehensive regulations nor addressed the hazard of noise in engine rooms because it believes that "statutory authority * * * to regulate the uninspected vessel fleet * * * beyond those areas presently regulated, does not exist" (App., 3a, *infra*). Thus, the Coast Guard has not simply failed to exercise recognized statutory authority; it maintains that it lacks authority to regulate further.

3. Contrary to petitioner's contention (Pet. 8-10; Supp. Pet. 1-3), there is no conflict among the courts of appeals on the question presented that warrants review by this Court. The decisions of other courts of appeals upon which petitioner relies do not address the significance of the fact that the uninspected vessel fleet is virtually unregulated. Moreover, in each of the cases cited, the holding did not necessarily rest on a finding of a statutory, industry-wide exemption. For this reason, statements in several of the opinions that all seamen are exempt from OSH Act coverage are merely dicta. In the absence of an actual conflict on the issue that is presented in this case, certiorari should be denied. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

In *Donovan* v. *Texaco, Inc.*, 720 F.2d 825 (1983), the Fifth Circuit found that an OSHA employee protection provision could not be enforced aboard a vessel that was inspected and thus was, as the Secretary acknowledged (720 F.2d at 826, 827 n.3), subject to pervasive regulation by the Coast Guard. Because the vessel was inspected, the Secretary conceded that the exemption in 29 U.S.C. 653(b)(1) generally was applicable to the vessel in question, and the scope of the exemption as regards the question presented in this case therefore was not in issue. The only question in

*Texaco* was whether the employee protection provision was applicable notwithstanding the exemption. The court's broad language that all seamen are exempt from OSH Act coverage was therefore unnecessary to the decision. Similarly, in its prior decision in *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (1980), the Fifth Circuit did not consider the preemption question in the context of whether the vessel involved was inspected or uninspected. The court based its decision in part on a finding that the proffered OSHA regulations did not appear relevant to any working conditions on the vessel involved. *Id.* at 1122. Moreover, the court in *Clary* mistakenly found that the *Commission* "has disclaimed an intention to promulgate standards applicable to seamen." *Ibid.* Because the Secretary, rather than the Commission, has authority to promulgate regulations and because the Secretary has determined that he does have jurisdiction over working conditions of employees aboard uninspected vessels, *Clary's* broad language rested on an erroneous premise.

The Fourth Circuit decisions cited by petitioner also fail to address squarely the industry-wide exemption issue. In *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 (1980), the question was whether Coast Guard regulations applied to longshoremen, not whether Coast Guard regulations applied to seamen. The court held that longshoremen are under the jurisdiction of OSHA, not the Coast Guard. Accordingly, it never considered the distinction between inspected and uninspected vessels and the impact of that distinction on preemption of OSHA's jurisdiction under 29 U.S.C. 653(b)(1) over the working conditions of seamen. The other Fourth Circuit decision, *Barger* v. *Mayor & City Council of Baltimore*, 616 F.2d 730, cert. denied, 449 U.S. 834 (1980), likewise did not address the statutory exemption. There the court held that the Coast Guard, not OSHA, had jurisdiction over the hazard at issue, but the court

rested its conclusion on the ground that the Secretary's regulations themselves excluded seamen from coverage. 616 F.2d at 732. Moreover, the Fourth Circuit has, on other occasions, confirmed that the statutory exemption is activated only by the actual exercise of authority by a sister agency. See, *e.g., Southern Ry.*, 539 F.2d at 336-337.

Finally, in *Kopczynski* v. *The Jacqueline*, 742 F.2d 555 (1984), the Ninth Circuit held that the Coast Guard, not OSHA, had jurisdiction over the particular safety hazard. However, the OSHA regulation that the Jones Act plaintiff sought to invoke (see *id.* at 558) was adopted from regulations issued under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, which, the Court found, expressly excluded seamen from coverage. See 29 C.F.R. 1918.1. See also 742 F.2d at 559, quoting 29 C.F.R. 1915. 2(b).[8] The court's holding does not conflict with the decision below, because in *Kopczynski* the court did not consider whether the vessel in question was inspected or uninspected and did not consider the impact of that classification on the Coast Guard's preemption of OSHA's standards.

Because the decision below is compatible with these holdings of other courts of appeals, petitioner's argument (Pet. 10-12; Supp. Pet. 2) that uninspected vessels will be subject to the OSH Act only within the jurisdiction of the Second Circuit is incorrect. Uninspected vessels remain within the Act's coverage in every jurisdiction until expressly exempted.[9]

---

[8]Pursuant to statutory authority (§ 6(a), 29 U.S.C. 655(a)) the Secretary adopted certain longshoring safety and health regulations as OSHA standards. See 29 C.F.R. Pt. 1918.

[9]Contrary to petitioner's assertion (Pet. 12-13), it is the Secretary of Labor, not the Commission, who is charged with administration of the Act. For this reason, it is the Secretary's interpretation of the exemption provision, rather than the interpretation by the Commission, that is

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

FRANCIS X. LILLY
*Solicitor of Labor*

KAREN I. WARD
*Associate Solicitor*

ALLEN H. FELDMAN
*Counsel for Appellate Litigation*

BARBARA J. JOHNSON
*Attorney*

JANUARY 1985

---

entitled to judicial deference. Cf. *Whirlpool Corp.*, 445 U.S. at 11 (Secretary's interpretative OSHA regulation deserves deference). In any event, the Commission's decision in *Dillingham Tug & Barge Corp.*, *supra*, is erroneous. The Commission based its decision, in part, on the incorrect assumption that the Coast Guard believes that it has authority to regulate all working conditions aboard uninspected vessels. 10 O.S.H. Cas. (BNA) at 1861 n.8. See pages 3-4, *supra*. Moreover, the Commission stressed that the Coast Guard had exercised its authority to investigate marine casualties following the accident at issue. 10 O.S.H. Cas. (BNA) at 1861. However, the Coast Guard's authority to investigate maritime accidents when a fatality has occurred does not provide it with authority to regulate working conditions of seamen aboard uninspected vessels. The limited power to investigate deaths is the antithesis of true occupational safety and health legislation, which is designed to prevent accidents from occurring in the first place. See *Whirlpool Corp.*, 445 U.S. at 11-12 & n.16.

DOJ-1985-01

## APPENDIX

30 Mar. 1984

A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, N.Y. 10007

Dear Mr. Fusaro:

This is in reply to your letter of February 22, 1984 concerning the case of *Donovan* v. *Red Star Marine Service, Inc.*, Nos. 83-4158, 83-4168. Your letter contained four questions, posed by the court, relating to the authority of the Coast Guard to regulate uninspected tugboats.

Section 2101(43) of Title 46, United States Code, defines an uninspected vessel as "a vessel not subject to inspection under section 3301 of this Title that is not a recreational vessel." Section 3301 lists ten categories of vessels which are subject to Coast Guard inspection, while 46 U.S.C. 3309 provides for a certificate of inspection to be issued to a vessel found to be in compliance with law and regulation. The category most likely to include towing vessels (tugboats) is 46 U.S.C. 3301(7), "seagoing motor vessels," defined in 46 U.S.C. 2101(33), as "motor vessel(s) of at least 300 gross tons making voyages beyond the Boundary Line." A seagoing towing vessel of less than 300 gross tons is then, by definition, an uninspected vessel, not included within the provisions of section 3301 and not subject to Coast Guard inspection.

With regard to the court's questions the following is offered:

(1) Does the Coast Guard have authority to regulate noise levels on uninspected tugboats of under 300 tons, such as the "Stamford" and "New Haven"?

No. The Coast Guard's primary authority to regulate uninspected towing vessels (tugboats) is contained in 46 U.S.C. Chapter 41 and 46 U.S.C. § 8904. Regulations applicable to those vessels, contained in 46 C.F.R. Subchapter C, include requirements for lifesaving and fire-fighting equipment, backfire flame control, ventilation, casualty reporting, and licensed operators. Additional regulatory schemes which embody the nautical rules of the road, aids to navigation and pollution compliance requirements also apply to uninspected vessels. The statutory authority for these regulations could not be construed to support Coast Guard regulation of noise levels on those vessels.

(2) Does the Coast Guard exercise such authority if it exists?

No; see (1) above. The Coast Guard has, however, issued recommendations on control of excessive noise, in Navigation and Vessel Inspection Circular 12-82, which are considered appropriate recommendations for uninspected vessels.

(3) Is there any legal reason why OSHA should not regulate noise levels on boats such as these?

But for the decision in *Dillingham Tug & Barge Co.*, 1982 O.S.H. Dec. (CCH) Para. 26,166 (Rev. Comm'n) I am unaware of any decisions or statutory prohibition addressing the issue of whether section 4(b)(1) of the Occupational

Safety and Health Act (29 U.S.C. 653(b)(1)) precludes OSHA regulation of such a condition aboard uninspected vessels.

(4) Can there be joint regulation of such noise levels by the Coast Guard and OSHA?

No. Given the response in (1), above, the Coast Guard is no more empowered to regulate noise levels jointly with OSHA than it is to regulate them independently.

It is my opinion that the statutory authority for the Coast Guard to regulate the uninspected vessel fleet (principally towing vessels, fishing vessels and yachts) beyond those areas presently regulated, does not exist. That our authority is so limited has been the Coast Guard's historical position. Over the past twenty years several attempts have been made to obtain additional grants of authority from the Congress to more comprehensively regulate portions of the uninspected vessel fleet. Congressional action during the same period, most notably the failure to provide additional authority to regulate towing vessels, has evidenced an unwillingness to expand the Coast Guard's authority to regulate towing vessels.

I hope this reply will be of assistance to the court in rendering a decision in the case now before it.

Sincerely,

E. H. DANIELS
Rear Admiral, U.S. Coast Guard
Chief Counsel

Office - Supreme Court, U.S.
FILED
FEB 12 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-590

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

RED STAR MARINE SERVICES, INC.,

*Petitioner,*

*vs.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONER

JAMES M. KENNY
McHUGH & O'CONOR
*Attorneys for Petitioner*
80 Pine Street
New York, New York 10005
(212) 422-0222

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Table of Authorities | ii |
| Reply Brief for Petitioner | 1-6 |
| APPENDIX: | |
| Navigation and Vessel Inspection Circular No. 12-82 | 1a |

PAGE

## *Table of Authorities*

### Cases Cited

Baltimore & O.R.R. v. OSHRC, 548 F.2d 1052 (D.C. Cir. 1976) ..... 3

Dillingham Tug & Barge Corp., 10 O.S.H. Cas., (BNA) 1859, 1982 OSHD 32, 993, 32, 996 ..... 3

Donovan v. Texaco, Inc., 720 F.2d 825 (5th Cir. 1983) 2

Secretary v. Belt Ry. of Chicago, 20 OSAHRC 575, 3 Occupational Safety & Health Rep. (BNA) 1617 5

Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976) ..... 3

Southern Ry. Co. v. OSHRC, 539 F.2d 335 (4th Cir. 1976) ..... 2, 3

### Statutes Cited

29 U.S.C. 653(a) ..... 2, 5

43 U.S.C. 1301 ..... 2

43 U.S.C. 1331(a) ..... 2

46 U.S.C. §88 ..... 2

### Regulation Cited

29 C.F.R. §1910.95 ..... 5

46 C.F.R. 26.25-1 ..... 3

46 C.F.R. Subchapter C ..... 3

NO. 84-590

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

RED STAR MARINE SERVICES, INC.,

*Petitioner,*

*vs.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONER

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

After oral argument of the appeal below the Coast Guard was invited by the Court of Appeals *sua sponte* to answer four questions posed by the Court relating to the authority of the Coast Guard to regulate uninspected vessels. Respondent has added to the record on this petition the reply of the Chief Counsel of the Coast Guard dated March 30, 1984. That reply as well as the references therein to United

States Coast Guard Navigation and Inspection Circular No. 12-82, places new issues before the Court which are properly addressed in this reply brief. Further, the failure of respondent to comment upon the geographical limitation on the jurisdiction of the Occupational Health and Safety Administration (OSHA) merits this reply brief.

Respondent has ignored the conflict between OSHA's position that it can regulate the workplace of seamen on the high seas and the geographic scope of OSHA's authority. The express definition within the statutes governing and defining OSHA's purview does not include the high seas. 29 U.S.C. 653(a), 43 U.S.C. 1331(a), 43 U.S.C. 1301; *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983) (Pet. 11).* There can be no clearer statement of Congressional intent that OSHA cannot regulate the workplace of the tug STAMFORD which is authorized to, and does, ply the waters of the high seas. The Coast Guard did a stability analysis of the STAMFORD which pertained to the safety of the crew. (Pet. 28a). This stability analysis led to the issuance of a load line certificate pursuant to 46 U.S.C. §88 allowing the vessel to navigate on the high seas. (Pet. 13a).

The decisions, which are the keystone of Respondent's argument, permitting dual exercise of authority of an industry by OSHA and a sister agency, all involve land based work areas obviously within the Congressionally defined geographic scope of OSHA and are inapposite to this case. (Resp. 6, 7, 8)** *Southern Ry. Co.* v. *OSHRC,*

---

* References to petition and appendix to the petition for writ of certiorari are designated herein as: "Pet.—."

** References to Brief For Respondent and appendix thereto are designated herein as "Resp.—."

539 F.2d 335 (4th Cir. 1976); *Southern Pacific Transportation Co.* v. *Usery,* 539 F.2d 386 (5th Cir. 1976); *Baltimore & O.R.R.* v. *OSHRC,* 548 F.2d 1052 (D.C. Cir. 1976).

The Coast Guard Chief Counsel stated in response to the inquiry of the Court of Appeals that, "Over the past twenty years several attempts have been made to obtain additional grants of authority from the Congress to more *comprehensively* regulate portions of the uninspected vessel fleet. (emphasis added) (Resp. 3a). Explicit in this statement is the fact that the Coast Guard does exercise "comprehensively" and does have "authority" to regulate uninspected vessels. Contrary to Respondent's assertion (Resp. 8, f.n.5), Petitioner does assert that the Coast Guard has *exercised* authority to regulate specific working conditions on board uninspected vessels including stability (Pet.. 29a), ventilation, navigation, fire protection equipment, life preservers and other life saving equipment (Pet. 30a), as well as requirements for qualification of personnel (46 C.F.R. 26.25-1). Respondent's assertion that the Coast Guard has not exercised any authority to regulate, generally, engine rooms ignores those regulations in 46 C.F.R. Subchapter C concerning the design, construction and testing of boilers and machinery; liquified petroleum gas, and backfire flame arrestors for gasoline equipment. *Dillingham Tug & Barge Corp.,* 10 O.S.H. Cas., (BNA) 1859, 1982 OSHD 32, 993, 32, 996.

The letter of the Coast Guard Chief Counsel (Resp. 2a) refers to the Navigation and Vessel Inspection Circular 12-82 (App., *infra*) which contains recommendations to regulate noise hazards aboard inspected vessels and guidelines for uninspected vessels for the same purpose. Although the recommendations were "not directed specifically to uninspected vessels, the Coast Guard considers

them to be appropriate guidelines should any owner of uninspected vessels also choose to follow them." (App. 2a). The Coast Guard recommendations apply to all commercial inspected vessels but are not regulations promulgated governing that fleet. Hence, the Coast Guard does not have noise regulations applying to inspected or uninspected vessels. The recommendations do not have the force of law. The recommendations are as much an exercise of authority over the uninspected fleet as they are over the inspected fleet. The issuance of "guidelines" for noise hazards on uninspected vessels is plainly an actual exercise of authority by the Coast Guard in this area. The legislative history of OSHA supports this rationale:

> It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction *has taken steps* to exercise its authority even though the action might be at the formative stage of regulations or enforcement. (emphasis added). Staff of Subcommittee on Labor, Senate Comm. on Labor & Public Welfare, 92nd Cong. 1st Sess., Legislative History of the Occupational Safety & Health Act of 1970, 997 (Comm. Print 1971).

A comparison of the Coast Guard recommendations and the OSHA noise hazard regulations demonstrate realistic considerations which support the conclusion that jurisdiction should not be taken from the Coast Guard, the agency with expertise in the marine industry and given to OSHA. The Coast Guard recommendations are based on studies which account for the requirement that seamen on vessels like the STAMFORD must work and live in the workplace. These studies were cognizant of the important differences between the environment of shoreside

workers and seamen (App. 3a). Accordingly, the Coast Guard method of evaluating excessive noise in the maritime industry is by measuring noise exposure for the complete twenty-four hour day. This . . . "concept differs somewhat from the criteria proscribed [sic] by the Occupational Safety and Health Administration (OSHA) because of several factors which distinguish the maritime industry from industry ashore." (App. 4a). The OSHA regulations are consistent with the land based geographical scope of OSHA's jurisdiction. 29 U.S.C. 653(a). The OSHA regulations are based upon measuring exposure during a one-quarter hour to eight hour period. 29 C.F.R. §1910.95.

The OSHA noise hazard regulations realistically should not be applied to the marine industry whether the vessels are uninspected or inspected. The OSHA noise hazard regulations are based upon a different concept and criteria than the Coast Guard guidelines. Their application to uninspected vessels is manifestly unfair.

Attempts by OSHA and the Coast Guard to administratively "carve up" the jurisdiction of the uninspected fleet of the marine towing industry should not be permitted as a substitute for Congressional action. The effect of the "administratively created" division of jurisdiction over the workplaces of seamen is to place the employer in the difficult position of complying with two agencies concerning the occupational safety and health of its employees. The difficulty of this position is exhibited by the voluminous amount of OSHA regulations which constitute a stack of paper over six feet high. *Secretary* v. *Belt Ry. of Chicago*, 20 OSAHRC 575, 3 Occupational Safety & Health Rep. (BNA) 1617. The difficulty is further exhibited by con-

sidering the fact that the OSHA regulations do not consider the idiosyncratic nature of the maritime workplace.

Dated: New York, New York
February 11, 1985

Respectfully submitted,

JAMES M. KENNY
McHUGH & O'CONOR
*Attorneys for Petitioner*
80 Pine Street
New York, New York 10005
(212) 422-0222

## APPENDIX

**Navigation and Vessel Inspection Circular No. 12-82**

[SEAL]

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Mailing Address

U.S. Coast Guard (G-MVI-2)
Washington, D.C. 20593
202-426-2190

NVC 12-82

2 Jun 1982

NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 12-82.

Subj: Recommendations On Control of Excessive Noise.

Ref: (a) 46 CFR 32.40-15

(b) 46 CFR 72.20-5

(c) 46 CFR 92.20-5

(d) International Maritime Organization (IMO) Resolution A.468(XII), "Code On Noise Levels On Board Ships".

(e) U.S. Naval Ocean Systems Center, "Study of Airborne Noise On Merchant Ships" (see enclosure (9), reference 1).

*Navigation and Vessel Inspection Circular No. 12-82*

1. *PURPOSE.* This Circular contains Coast Guard's recommended guidlines to the U.S. maritime industry for addressing conditions of high noise. The guidelines were developed in consideration of the need for protecting crewmembers from noise exposures which may produce permanent noise induced hearing loss; for providing crewmembers with suitable conditions for recuperation from the effects of exposure to high noise levels; and for providing a safe working environment by giving consideration to the need for effective speech communication and for hearing audible alarms and warnings. Amplifying information in attached enclosures is provided as guidance in addressing key aspects of noise control.

2. *APPLICATION.*

a. The recommendations of this Circular apply to all commercial vessels inspected by the Coast Guard except Mobile Offshore Drilling Units.

b. Although these guidlines are not directed specifically to uninspected commercial vessels, the Coast Guard considers them to be appropriate guidelines should any owner of uninspected vessels also choose to follow them.

c. At the time of this publishing, the Coast Guard is collecting data to determine whether separate guidelines would be appropriate for inspected offshore drilling units and fixed structures. However, in lieu of separate guidelines, these guidelines are recommended for the interim.

*Navigation and Vessel Inspection Circular No. 12-82*

3. *DISCUSSION.*

a. According to a recent Coast Guard-sponsored study (enclosure (9), ref. 1), noise exposures of certain personnel aboard U.S. merchant vessels were found to be in excess of those considered to be safe. The study also indicated that high noise levels aboard ship interfere with speech intelligibility, internal shipboard communications and the audibility of warning signals, which potentially impairs the safety of some operations on the vessel. Additional studies from foreign countries and information from other sources overwhelmingly support these findings for virtually all classes of commercial vessels. The studies also demonstrate that unlike shoreside workers who can retreat to a quiet environment after their work shift, merchant seamen are part of a mobile environment and may not have the opportunity to retreat to a quieter, relaxed atmosphere. Crew quarters, recreation areas, mess rooms, etc. are sometimes as noisy as the working environment. Similar problems are also widely reported in the offshore drilling industry. (NOTE: At the time of this publishing, the Coast Guard is still conducting a study on the particular noise problems in the offshore drilling industry.)

b. The effect of noise on hearing is a function of the actual noise level, its component frequencies and the duration of exposure. An excessive combination of these elements results in a shift in a person's threshold of hearing, i.e., an elevation in the lowest level of sound detectable to the ear. A threshold shift may be recoverable to varying degrees, depending upon its magnitude, provided the

perseon retreats to a quiet environment (generally accepted as below 75 db(A)) for a sufficient time. While small threshold shifts may be totally recovered, large shifts are only partially recoverable leaving with each occurrence a small permanent threshold shift, known as hearing loss. The minimum goal of a noise control program should be to insure that an exposure (noise level over a certain duration) is not so great that the temporary threshold shift cannot be recovered during the following rest period.

c. After careful study, the Coast Guard has concluded that the most meaningful method of evaluating excessive noise in the maritime industry is by measuring the cumulative noise exposure during the complete 24-hour day. In addition to consideration of the normal work time noise exposure, the 24-hour exposure measurement considers the time after exposure to high noise to evaluate whether sufficient quiet time is provided to allow for recovery from temporary threshold shift. The term which will be used to express this measurement is the "24-hour effective exposure level," or Leff (24), and is defined in technical terms in enclosure (1). The Leff (24) concept differs somewhat from the criteria proscribed by the Occupational Safety and Health Administration (OSHA) because of several factors which distinguish the maritime industry from industry ashore. However, the Leff (24) criteria would afford similar protection.

d. The exposure limit recommended herein (82 dB(A)) is, like almost all exposure limits, based upon an evaluation of a certain degree of risk to

some personnel and does not insure that all personnel will not incur hearing damage. For this reason a hearing conservation program containing a system for periodic audiometric testing of personnel is necessary to detect those susceptible persons at the initial outset of a hearing impairment before any appreciable damage is accrued. Since, such a program would generally not be necessary if exposure levels (computed without regard to attenuation contributed by hearing protective devices) were further reduced to 77db(A), the Circular suggests that new vessels be so designed so that the 77db(A) level may be achieved.

e. The control methods, i.e., engineering controls, administrative controls or hearing protective devices selected by the owner/operator of a unit to achieve the recommended exposure limits, would depend upon economic and other considerations. Based upon data obtained from the study conducted by the Coast Guard and the state of the art in present noise control technology, the recommendations could be implemented on most units without retrofitting, principally through the use of hearing protectors. Other units may additionally need to administratively limit the time of exposure, and/or install soundproof control booths. Ultimately, however, installation of permanent engineering controls to reduce noise levels is the best means of assuring effective hearing protection. Although this technology may be young in marine applications (in the United States), the Coast Guard has seen several examples where significant reductions in noise levels in engineering compartments through modest engineering controls were achieved. The exposure levels

in this proposal are such that they may be economically achieved on many vessels by using these engineering controls. It is encouraged that engineering controls be used whenever economically feasible.

f. In November 1981 the International Maritime Organization (IMO, formerly IMCO) approved a standard on shipboard noise entitled "Code On Noise Levels On Board Ships," which applies basically to new ships of 1600 gross tons or more. The Coast Guard participated in the development of this Code and endorses its recommendations. As the preamble to the Code makes clear however, it was not intended that the Code be adopted verbatim by member nations. Rather, each nation was permitted the flexibility to implement the priniciples of the Code through a method suited to the maritime industry of that nation. The Coast Guard believes therefore, that the recommendations in this Circular are a satisfactory implementation of the IMO Code. (NOTE: The IMO Code contains a section suggesting recommended noise level limits for various types of spaces on a unit. It is believed that this list offers guidance which would be useful to the designers of U.S. vessels and is therefore incorporated verbatim as an enclosure to this Circular. These levels are provided primarily as guidlines which might be useful for design specifications for suitable types of new vessels.)

g. It is considered that implementation of the recommendations in this Circular will involve an ongoing process encompassing a time frame of several months to years, depending upon the vessel. It is anticipated that phrase involving measurement,

provision of hearing protection devices, installation of some engineering controls, implementation of the hearing conservation program and other administrative aspects could be completed within two years. However, it may take up to four years before complete engineering solutions can be designed and installed.

h. The limits and procedures set out in these guidlines are regarded as minimum acceptable precautions against high noise conditions. For a greater margin of safety, owners and operators may wish to provide higher levels of protection. Also, as technology improves and as more scientific information becomes available, considerations will be given to amending these guidlines accordingly.

4. *ACTION.*

a. The following paragraphs b through i contain recommended guidlines fro protecting crewmembers from conditions of high noise. Additional information in the attached enclosures (1) through (9) are provided to amplify certain provisions of the recommendations. Definitions of terms used contained in enclosure (1).

b. *Recommended Exposure Limit.*

(1) Each crewmember's 24-Hour Effective Exposure Level, Leff(24), as defined in enclosure (1), should be constrained to a maximum of 82 dB(A).

(2) If exposure levels were further reduced, through engineering and administrative controls

alone, to an Leff(24) criteria of 77 dB(A, the hearing conservation program outlined below would no longer be necessary in most cases. The Coast Guard believes that the technology to accomplish this objective will be feasible on most deep-sea vessels, over 1600 gross tons, constructed after 1985 and recommends designing to the 77 dB(A) criteria at that time.

(3) NOTE: The exposure limits specified above are based upon the findings that exposures to high noise in the maritime industry are normally intermittent, as defined in enclosure (1). If work shift noise exposure is continuous, vice intermittent, then exposure levels should be reduced even further.

(4) Leff(24) can be achieved by any combination of engineering controls, administrative controls or hearing protective devices. However, because engineering controls provide the most positive means of assuring adequate protection, it is recommended that engineering controls be given first consideration and evaluated for feasibility before opting for other methods. Discussions on engineering controls and hearing protective devices are included in enclosures (4), (7) and (8).

(5) The Coast Guard realizes that reducing noise levels generally becomes increasingly more difficult on smaller vessels. It was for this reason that the IMO noise level limits referred to in subparagraph c.(2) below were restricted to vessels over 1600 gross tons. On many existing vessels of less than 500 gross tons, the incorporation of effec-

tive structural and engineering alterations to attenuate structure-borne noise may be economically prohibitive. However, through the use of hearing protective devices, administrative controls and selective engineering changes, the recommended 24-hour exposure limit, Leff(24), of 82db(A) should still be attainable.

c. *Recommended Noise Limits.*

(1) Where practicable, maximum noise levels in berthing spaces, and in mess spaces of units over 500 gross tons, should be no greater than 75 dB(A) on existing units and 70 dB(A) on new units.

(2) Annex III, paragraph (1)(e), of the International Regulations for Preventing Collisions at Seat, 1972 (commonly called the 72 COLREGS) contains the following requirements: "The sound pressure level of the vessel's [fog whistle] at listening posts shall not exceed 110 dB(A) and so far as practicable should not exceed 100 dB(A)." The 72 COLREGS are U.S. law and are mandatory for all U.S. vessels navigating on the high seas.

(3) As stated in Discussion paragraph 3.f., the "Code On Noise Levels On Board Ships," a noise standard published in November 1981 by the International Maritime Organization (IMO), contains a listing of suggested noise level limits for various spaces on ship. The Coast Guard considers that these limits would generally be appropriate for adoption as minimum design specifications for ocean-going vessels over 1600 gross tons which would be subject to the IMO Code. This list of limits is in enclosure (6). It is not intended

that the list supplant any other recommendation in this paragraph 4., nor is it meant to imply that, if followed, would any exposure limit recommended herein be automatically achieved.

d. *Hearing Protective Devices.*

(1) Unless the Leff(24) computed or measured for a crewmember accounts for and allows such an exposure, crewmembers should be required to wear hearing protective devices whenever entering spaces with noise levels greater than 85 dB (A).

(2) NOTE: Any exposure of persons not wearing hearing protection to noise levels over 105 dB(A) should be avoided. However, if such exposures are unavoidable, they should be constrained to the principle of intermittent exposure (see definition in enclosure (1)) such that each exposure duration is one-seventh of the total allowable exposure at that noise level.

(3) At no time should the unprotected ears of crewmembers be exposed to non-impulse noise levels over 115 dB(A) or to impulse noise levels over 140 dB(A).

e. *Evaluation of Noise Conditions.*

An evaluation of noise conditions should be conducted on each unit and the results documented. The evaluation should consider noise conditions during all normal operations underway and in port. Enclosure (3) should be consulted with regards to proper equipment and measurement procedures.

f. *Warning Notices.*

(1) Where the noise level in spaces exceeds 85 dB(A), entrances to such spaces should carry a warning notice advising personnel of the noise hazard and the need for hearing protection. (A guide for design of this sign is the ANSI Specification for Accident Prevention Signs, Z35.1-1972.) If only a minor portion of the space has such noise levels the particular location(s) or equipment should be identified at eye level, visible from each direction of access.

(2) Where hand tools, galley and other portable equipment product high noise levels in normal working conditions, warning information should be provided, preferably on the device.

g. *Instruction to Crewmembers.*

(1) Crewmembers should be instructed in the hazards of high and long duration noise exposure and the risk of noise induced hearing loss. Instruction should also include a description of the unit's noise control program, the types of hearing protection devices provided and their proper use and care, and the unit's hearing conservation program.

(2) Appropriate crewmembers should receive such instruction as it necessary in the correct use and maintenance of machinery and silencers or attenuators in order to avoid the production or transmission of unnecessary noise.

h. *Hearing Conservation Program.*

(1) All crewmembers having 24-Hour Effective Exposure Levels (computed, in this case, without regard to attenuation contributed by hearing protective devices) greater than 77 dB(A) or routinely exposed to noise levels greater than 85 dB(A) should be included in a hearing conservation program as outlined in enclosure (5).

(2) Much of the maritime industry utilizes a highly mobile labor force of which individual personnel work a vessel or rig for a limited period and then move on to another unit. Consequently, it is often impractical for operators of these units to individually implement portions of hearing conservation programs involving audiometric testing and recordkeeping. In such cases it is recommended that a program of audiometric testing be coordinated on a group basis between the owner/operators and the employees.

i. *Responsibilities.*

(1) The owner/operator of unit should be responsible for ensuring that means for noise reduction and control are applied and maintained according to the recommendations of this Circular. Particular attention should be paid to insuring that the unit's officers are informed of the provisions of the unit's noise control program and the need for instructing crewmembers as provided in paragraph f, and to insuring that hearing protectors are provided and maintained.

(2) Crewmembers should be responsible for complying with the unit's noise control program,

*Navigation and Vessel Inspection Circular No. 12-82*

as instructed, paying particular attention to wearing provided hearing protectors in the proper manner while working in the prescribed locations.

CLYDE LUSK, JR.
Chief, Office of Merchant Marine Safety